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In the Supreme Court of the United States

C. A. TERHUNE, *Petitioner,*

v.

JEROME ALVIN ANDERSON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX
PETITION FOR WRIT OF CERTIORARI

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INDEX

		Pages
Appendix A	United States Court of Appeals for the Ninth Circuit, No. 04-17237, D.C. No. CV-00-002494-WBS, Opinion, filed February 15, 2008	1-48
Appendix B	United States Court of Appeals for the Ninth Circuit, No. 04-17237, D.C. No. CV-00-002494-WBS, Opinion, filed November 8, 2006	1-27
Appendix C	In the United States District Court for the Eastern District of California, No. CIV S-00-2404 WBS DAD P, Findings & Recommendations, filed September 28, 2004	1-64
Appendix D	In the Court of Appeal of the State of California, Third Appellate District, No. C030610, Opinion, filed March 2, 2000	1-46
Appendix E	Superior Court of the State of California, County of Shasta, No. 97F5048, Memorandum of Decision on Motion to Suppress Evidence and Motion in Limine; Order, dated June 17, 1998	1-17

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON, *Petitioner-Appellant,* v. **C.A. TERHUNE, Warden,** *Respondent-Appellee.*	No. 04-17237 D.C. No. CV-00-002494-WBS OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding
Argued and Submitted
October 9, 2007–San Francisco, California
Filed February 15, 2008
Before: Mary M. Schroeder, Stephen Reinhardt,
Sidney R. Thomas, Barry G. Silverman,
M. Margaret McKeown, Kim McLane Wardlaw,
William A. Fletcher, Ronald M. Gould, Richard A. Paez,
Richard C. Tallman, Johnnie B. Rawlinson,
Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea,
and Sandra S. Ikuta, Circuit Judges.
Opinion by Judge McKeown;
Concurrence by Judge Silverman;
Partial Concurrence and Partial Dissent by Judge Bea;
Dissent by Judge Tallman

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that a state court unreasonably concluded that a defendant's statements that "I don't even wanna talk about this no more," and "I plead the Fifth," were ambiguous in context, and that the interrogating officer's retort–"Plead the Fifth. What's that?"–sought clarification.

Appellant Jerome Anderson, who was convicted of special circumstance murder in California state court and denied state post-conviction relief, petitioned for a writ of habeas corpus in federal district court, claiming that he was denied both his constitutional right to remain silent and due process by the introduction of his involuntary confession into evidence, and by the exclusion of evidence of coercion in the interrogation process. The state court concluded that Anderson's statements to police while in custody that "I don't even wanna talk about this no more," and "I plead the Fifth," were ambiguous in context, and that the interrogating officer's retort–"Plead the Fifth. What's that?–sought clarification. Once Anderson stated "I'd like to have an attorney present," the interrogating officers stopped the interrogation and turned the tape recorder off. However, the officers subsequently concluded that Anderson wanted to reinitiate the discussion, and after three hours of further questioning, Anderson confessed. The district court denied Anderson's petition.

Anderson appealed.

[1] Under *Miranda*, if an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. **[2]** "Context" cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence. **[3]** Nothing was ambiguous about the statement "I plead the Fifth." "Ambiguity" means admitting more than one interpretation or reference or having a double meaning or reference. **[4]** Anderson did not equivocate in his invocation by using words such as "maybe" or "might" or "I think." Anderson had already twice attempted to stop the police questioning using crystal-clear language: "I don't want to talk about this no more," and "Uh! I'm through with this," and "I wanna be taken into custody." Saying that he wanted to be taken into custody was an indication that Anderson did not want to talk about the murder or anything else. "Taking the Fifth" is as unequivocal as one can get in invoking the right to remain silent.

[5] Police must scrupulously honor a suspect's right to remain silent by immediately ceasing questioning when the suspect invokes this right. **[6]** Instead of scrupulously honoring the request, the interrogating officer decided to "play dumb" hoping to keep Anderson talking by inquiring, "Plead the Fifth. What's that?" At best, the officer was mocking and provoking Anderson. **[7]** No reasonable officer could legitimately be in doubt about the meaning of "I plead the Fifth." The state court's characterization was a fanciful re-imagining of the colloquy between Anderson and the officer, and under the Antiterrorism and Effective Death Penalty Act (AEDPA), an unreasonable determination of the facts. **[8]** Where the initial request to stop the questioning is clear, the police may not create ambiguity in a defendant's desire by continuing to question him or her about it. By parsing Anderson's invocation into specific subjects, the police failed to honor a decision of a person in custody to cut off questioning. **[9]** The state court's decision to ignore an unambiguous declaration of the right to remain silent was an unreasonable application of *Miranda*. The state court's labeling of Anderson's statements as ambiguous and characterizing the officer's response as a legitimate clarifying inquiry were unreasonable determinations of fact.

[10] An accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. **[11]** All questioning must immediately cease once the right to remain silent is invoked, and any subsequent statements by the defendant in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation. **[12]** The court of appeals could not simply suppress the portion of the interrogation that occurred after the invocation of the right to silence and before Anderson's purported re-initiation of the interrogation. **[13]** The prejudice from Anderson's confession could not be soft pedaled, and the error was not harmless. **[14]** The judgment of the district court is reversed and the case had to be remanded with instructions to grant the writ.

Judge Silverman concurred, writing separately to state that, in its treatment of the state appellate court's ruling that Anderson's statements were ambiguous in context, the majority failed to observe that an unreasonable application of federal law is different from an incorrect application of federal law.

Judge Bea concurred in part, and dissented in part, writing that, given that Anderson validly waived his right to counsel and his right to remain silent before he confessed, the admission of his confession was not error, and the state appellate court's denial of habeas relief was not contrary to, nor an unreasonable application of, clearly established federal law.

Judge Tallman dissented, writing that the majority fixated on the words "plead the Fifth," lifted in isolation from a portion of the transcribed interview, without giving the required level of deference to the trial court's findings of fact after an evidentiary hearing, which included the entire tape recording and the testimony of the interrogators; the state courts' conclusion was not unreasonable.

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

It is likely that few Americans can profess fluency in the Bill of Rights, but the Fifth Amendment is surely an exception. From television shows like "Law & Order" to movies such as "Guys and Dolls," we are steeped in the culture that knows a person in custody has "the right to remain silent." *Miranda* is practically a household word. And surely, when a criminal defendant says, "I plead the Fifth," it doesn't take a trained linguist, a Ph.D., or a lawyer to know what he means. Indeed, as early as 1955, the Supreme Court recognized that "in popular parlance and even in legal literature, the term 'Fifth Amendment' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination." *Quinn v. United States*, 349 U.S. 155, 163 (1955); *accord In re Johnny V.*, 149 Cal. Rptr. 180, 184, 188 (Cal. Ct. App. 1978) (holding that the statement "I'll take the fifth" was an assertion of the Fifth Amendment privilege). More recently, the Court highlighted that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

We granted a rehearing en banc[1] in this appeal from the district court's denial of Jerome Alvin Anderson's petition for writ of habeas corpus. Anderson challenges his conviction of special circumstances murder on the grounds that he was denied his constitutional right to remain silent and that admission of his involuntary confession into evidence violated his right to due process. Specifically, Anderson claims that he invoked his Fifth Amendment right to terminate his police interrogation and that the police officer's continued questioning violated that right.

Anderson twice attempted to stop police questioning, stating "I don't even wanna talk about this no more," and "Uh! I'm through with this." After questioning continued, Anderson stated unequivocally, "I plead the Fifth." Instead of honoring this unambiguous invocation of the Fifth Amendment, the officer queried, "Plead the Fifth. What's that?" and then continued the questioning, ultimately obtaining a confession. It is rare for the courts to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent.

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[1] *Anderson v. Terhune*, 467 F.3d 1208 (9th Cir. 2006), *reh'g en banc granted*, 486 F.3d 1155 (9th Cir. 2007).

The state court held that Anderson's statement, "I plead the Fifth," was ambiguous and that the officer asked a legitimate clarifying question. Under even the narrowest construction of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) ("AEDPA"), the state court erred in failing to recognize this constitutional violation. The continued questioning violated the Supreme Court's bright-line rule established in *Miranda*. Once a person invokes the right to remain silent, all questioning must cease:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966); *see also Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (explaining that once a defendant has invoked his right to remain silent, that right must be "scrupulously honored") (quoting *Miranda*, 384 U.S. at 479).

An examination of the interrogation transcript[2] reveals that the state court's conclusion that Anderson's invocation was ambiguous was an unreasonable application of *Miranda* and based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). Only one reasonable conclusion can be gleaned from his statements, especially his last declaration, "I plead the Fifth": Anderson invoked his right to remain silent and wanted to end the interrogation. Constructing the officer's statement, "Plead the Fifth? What's that?", as asking what Anderson meant is also an unreasonable determination of the facts. *Id.* § 2254(d)(2). These errors were not harmless and, accordingly, we reverse the judgment of the district court and remand with directions to grant the writ of habeas corpus.

I. BACKGROUND

Anderson and the victim, Robert Clark, were friends. On the morning of July 9, 1997, a mutual acquaintance, Patricia Kuykendall, discovered that her car had been stolen. Anderson and Kuykendall suspected that Clark was involved and later that morning confronted him at Kuykendall's house.

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[2] Anderson filed a motion requesting that the en banc panel take judicial notice of the entire transcript of the interrogation. We asked the parties to clarify whether either the complete transcript or the audio tape of the interrogation was part of the record before the state appellate court. The answer is unclear, although it is undisputed that both were available to the court. Thus, we consider both to be part of the record in this appeal. Nonetheless, whether one considers the transcript of the audio tape, the result is the same.

Kuykendall began yelling at Clark, but Anderson remained calm. When Clark denied that he stole the car, he appeared edgy and nervous. As Kuykendall left the room to call the police, Clark left the house. Anderson and Kuykendall's roommate, Abe Santos, left ten minutes later, stating they were going to follow Clark.

Clark's body was discovered by the side of a road later that afternoon. He had been shot in the head four times. Investigators found a methamphetamine pipe lying between Clark's arm and body. A cigarette lighter was resting on Clark's stomach under his right hand. Pieces of a partially-eaten hamburger and a fresh cigarette butt were also near the body, as well as spent .22 caliber shell casings.

The police asked Anderson to come in for an interview two days later, July 11. During the interview, Anderson explained that on the day of the murder he saw Clark at Kuykendall's apartment in the morning, but that he and Santos left to buy some hamburgers, after which they went to Santos's father's house and to a car wash.

The police took Anderson into custody for a parole violation on July 12. Four officers interviewed Anderson for approximately three and a half hours. Despite clear and repeated invocations of his right to remain silent, the officer continued to question Anderson about the murder:

O'Connor: You act like you're cryin' like a baby, an', you can't cry for someone that was no good . . . an' you killed him for

	a good reason.
Anderson:	No, way. I – You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.
O'Connor:	Right now, you show your remorse.

Immediately after this exchange, the officer continued to interrogate Anderson regarding his drug use on the day of the murder, including whether Anderson had used pipes. This questioning is significant because the murder victim was found with a pipe next to him. The entire conversation was about the murder. In response to this questioning, Anderson unambiguously indicated that he wanted to end the interrogation by stating that he was "through with this," wanted to "be taken into custody" and "I plead the Fifth." The relevant portion of the transcript is so extraordinary that it bears repeating.

Anderson:	I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No way I would do it.
O'Connor:	Were you high that day?
Anderson:	No, sir. I – probably was later on. Yes.

O'Connor: Did you have any dope with you that . . . that day?

Anderson: No, sir.

O'Connor: No, dope at all? What do you smoke with?

Anderson: I smoke with my . . . my fingers.

O'Connor: When you smoke your dope what do you do with that? How do you smoke that?

Anderson: You smoke it with pipes and stuff like that.

O'Connor: Okay. What kind of pipes?

Anderson: Lines.

O'Connor: What kind of pipes?

Anderson: N'ah . . . I would – I –

O'Connor: Well, what kind of pipes?

Anderson: Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . .

O'Connor: Well, you already are. I wanna know what kinda pipes you have?

Anderson: I plead the [F]ifth.

O'Connor: Plead the [F]ifth. What's that?

Anderson: No, you guys are wrong. You guys are wrong. You guys have – I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right.

O'Connor: We're not makin' anything up.

Anderson: Sir, sure you are.

O'Connor: What are we makin' up?

Anderson: You're tellin' me that I didn't have tears in my eyes.

O'Connor: Yeah.

Anderson: You're tellin' me, okay, that, uh, uh, Abe said I kilt (sic) him. That's a lie.

The questioning continued until Anderson asked for a lawyer: "I'd like to have an attorney present." At that juncture, an officer turned off the tape recorder and, somewhat suspiciously, following this hiatus, the officers concluded that Anderson wanted to reinitiate the discussion. The further questioning, which took place over a three-hour period, led to a confession by Anderson.

Anderson was convicted of special circumstances murder. On appeal, as in the trial court, he challenged the admissibility of his confession, arguing that it was obtained in violation of *Miranda* and of his Fifth Amendment right to remain silent. The California Court of Appeal rejected Anderson's argument. The court concluded that Anderson's invocation of his right to remain silent was ambiguous and that the officer asked a legitimate clarifying question when he responded to Anderson's statement, "I plead the [F]ifth," with "Plead the [F]ifth. What's that?" The state appellate court reasoned that Anderson could have been refusing to talk about his drug use, and did not intend to terminate the interview. The state court further held that Anderson waived any invocation of the right to silence or to counsel when he re-initiated the interrogation after the officers turned of the tape.

II. STANDARD OF REVIEW

Under AEDPA, a writ of habeas corpus may not be granted unless the state court's decision (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2). Although this standard requires us to give considerable deference to the state courts, AEDPA deference is not a rubber stamp. *See Miller-El v. Dretke*, 545 U.S. 231, 240, 265 (2005) (refusing to accept a state court's "dismissive and strained interpretation" of the prisoner's evidence on habeas review and, noting that "[d]eference does not by definition preclude relief"). The state court decision here collides with AEDPA on all grounds. It reflects both an unreasonable application of *Miranda*, which is clearly established federal law, and an unreasonable determination of the facts.

III. IN CONTRAVENTION OF *MIRANDA*, THE STATE COURT UNREASONABLY CONCLUDED THAT ANDERSON'S INVOCATION ("I PLEAD THE FIFTH") WAS AMBIGUOUS

[1] Following the issuance of *Miranda* in 1966 and the literally thousands of cases that repeat its rationale, we rarely have occasion to address a situation in which the defendant not only uses the facially unambiguous words "I plead the Fifth," but surrounds that invocation with a clear desire not to talk any more. The state court accurately recognized that under *Miranda*, "if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," 384 U.S. at 473-74, but then went on to eviscerate that conclusion by stating that the comments were "ambiguous in context":

> In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.

[2] Using "context" to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot

be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence. As the Supreme Court has observed, in invoking a constitutional right, "a suspect need not 'speak with the discrimination of an Oxford don.'" *Davis v. United States*, 512 U.S. 452, 459 (1994)[3] (quoting *id.* at 476 (Souter, J., concurring in judgment)). Anderson would meet even this erudite standard. *Miranda* requires only that the suspect "indicate[] in any manner . . . that he wishes to remain silent." *Miranda*, 384 U.S., at 473-74.

[3] This is not a case where the officers or the court were left scratching their heads as to what Anderson meant.[4] Nothing was ambiguous about the statement "I plead the Fifth." Ambiguity means "admitting more

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[3] We acknowledge that *Davis* is an invocation of counsel case under *Miranda*, not a Fifth Amendment right to silence case. We rely on *Miranda* and *Mosley*, not *Davis*, as "clearly established" law. *See Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996) (declining to address whether *Davis* applies to right to silence cases). Nonetheless, the general principles from cases involving the clarity of invocation of rights during custodial interrogation are instructive as to common sense interpretation of language.

[4] The trial court stated, "while the defendant articulated words *that could, in the isolation* [*sic*], *be viewed as an invocation of his right to remain silent*, the defendant did not intend to terminate the interview." (emphasis added). Similarly, the state court of appeal stated, "In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use *as opposed to not wanting to continue the questioning at all.*" (emphasis added). Obviously, the court recognized that "I plead the Fifth" was an invocation of the right to silence; it detected ambiguity only as to the scope of the invocation.

than one interpretation or reference" or "having a double meaning or reference." The New Shorter Oxford English Dictionary (1993). Even if the preliminary statements "I don't even wanna talk about this no more" and "I'm through with this. I'm through. I wanna be taken in custody," were viewed as somewhat equivocal–a dubious conclusion at best–"I plead the Fifth" left no room for doubt.

As we recently observed, "neither the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or more technically-worded than 'I have nothing to say.'" *Arnold v. Runnels*, 421 F.3d 859, 865 (9th Cir. 2005). We went on to underscore that Arnold's statement easily met the Fifth Amendment standard: "Indeed, it is difficult to imagine how much more clearly a layperson like Arnold could have expressed his desire to remain silent." *Id.* at 866.

[4] Anderson did not equivocate in his invocation by using words such as "maybe" or "might" or "I think." *See id.* at 865-66 (distinguishing cases in which the court concluded that a qualified invocation was ambiguous from cases in which the invocation of the right to silence was specific and unambiguous). Nor was there anything ambiguous in Anderson declaring, "I plead the Fifth." Anderson had already *twice* attempted to stop the police questioning using crystal-clear language: "I don't want to talk about this no more" and "Uh! I'm through with this. I'm through. I wanna be taken into custody . . . ." Saying that he wanted to be taken into custody was an indication that Anderson did not want to talk about the murder, his drug use, or anything else. Thus, the state court was unreasonable

in concluding that the invocation was ambiguous in context because the context, in fact, makes it clear that Anderson wanted to end the interrogation in all respects. Anderson had the right to end the interrogation at any point and the fact that Anderson had answered the officers' questions for over two hours does not somehow undermine or cast doubt on an unambiguous invocation. Whether these were "statements of frustration," as the government posited at oral argument, misses the point. A suspect can both be frustrated with an interrogation and seek to terminate it. "Taking the Fifth" is as unequivocal as one can get in invoking the right to remain silent.

IV. THE STATE COURT'S CONCLUSION THAT THE OFFICER ASKED A LEGITIMATE CLARIFYING QUESTION WAS AN UNREASONABLE DETERMINATION OF THE FACTS

[5] Anderson's unambiguous, unequivocal invocation should have brought an immediate end to questioning. Notably, the Supreme Court's commitment to *Miranda's* fundamental tenet–that police must "*scrupulously honor*[]" a suspect's right to remain silent by immediately ceasing questioning when the suspect invokes this right, 384 U.S. at 479 (emphasis added)–has never wavered. *See Mosley*, 423 U.S. at 103 (*Miranda's* "critical safeguard" is a "person's 'right to cut off questioning'"); *see also Arizona v. Roberson*, 486 U.S. 675, 683 (1988); *Kolender v. Lawson*, 461 U.S. 352, 368 n.6 (1983) (Brennan, J., concurring; *cf. Dickerson*, 530 U.S. at 440 (reaffirming constitutional requirement that "the exercise of [*Miranda*] rights must be fully honored").

[6] Instead of scrupulously honoring the request, the interrogating officer decided to "play dumb," hoping to keep Anderson talking by inquiring, "Plead the Fifth. What's that?" This effort to keep the conversation going was almost comical. At best, the officer was mocking and provoking Anderson. The officer knew what "I plead the Fifth" meant. It is thus baffling that the state court determined that "[b]y asking defendant what he meant by pleading the Fifth, the officers asked a legitimate clarifying question." The need for clarification presumes some ambiguity or uncertainty. Nothing needed clarification.

This situation brings to mind the phrase attributed to a Canadian judge–"won't take no for an answer"–and later popularized in county music as "What part of 'no' don't you understand?"[5] What about the words "I plead the Fifth" is unclear, ambiguous, or confusing to a reasonable officer? Nothing. *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (holding in the context of the invocation of the right to counsel that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous"). Rather, the officer hoped Anderson would explain more about the murder, the exact topic Anderson did not want to talk about. The officer thought that continuing the interrogation was "reasonably likely to elicit an incriminating response" from Anderson. *Rhode Island v. Innis*, 446 U.S 291, 303

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[5] *See* The Phrase Finder, What part of no don't you understand?, http://www.phrases.org.uk/meanings/what-part-of-no.html (last visited Nov. 30, 2007); LORRIE MORGAN, *What Part of No* (words and music by Wayne Perry and Gerald Smith), on WATCH ME (BNA Records 1992).

(1980). And he was right.

In the right-to-counsel context, the Supreme Court has countenanced clarifying questions only to ascertain whether a suspect's ambiguous or equivocal statement is actually an invocation of his Fifth Amendment right. *See Davis*, 512 U.S. at 461; *Miranda*, 384 U.S. at 445 (focusing only on the threshold question of whether the accused "indicate[d] in any manner that he d[id] not wish to be interrogated" when deciding whether police had honored the accused's Fifth Amendment rights); *cf. Smith v. Illinois*, 469 U.S. 91, 95 (1984) (holding that "[t]his case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance"). Ignoring this principle, the state court found that the comments were ambiguous "because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all."

[7] The state court's rationale collapses beneath its own weight, because the officer's comment showed that the interrogating officers did not believe that Anderson's statement was ambiguous. The officer did not ask Anderson what subject he did not want to discuss; nor did any of his follow-up questioning address this topic. Similarly, the officer did not ask him if he wished to remain silent or whether he simply did not want to talk about the drug issue. The officer did not even ask Anderson what he meant. No reasonable officer could legitimately be in doubt about the meaning of "I plead the Fifth." The state court's characterization is a fanciful re-imagining of the colloquy between Anderson and the officer, and under AEDPA, an unreasonable determination of the facts.

The state court's conclusion that "[i]t was the defendant, not the interrogators, who continued the discussion," ignores the bedrock principle that the interrogators should have stopped all questioning.[6] A statement taken after the suspect invoked his right to remain silent "cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474.

Finally, it makes no sense to split hairs and say that maybe, just maybe, Anderson wanted to talk about the murder and not about his drug use because, in fact, the drug use was inextricably intertwined with the murder. The victim's body was found next to a methamphetamine pipe. Anderson's drug use that day could well tie him to the murder. He was taken in for questioning about the murder, not on a potential drug charge.

It is precisely this kind of conjecture and hair-splitting that the Supreme Court wanted to avoid when it fashioned the bright-line rule in *Miranda*. *Cf. Davis*, 512 U.S. at 461 (noting that, where the suspect asks for counsel, the benefit of the bright-line rule is the "clarity and ease of application" that "can be applied by officers in the real world without unduly hampering the gathering of information" by forcing them "to make difficult judgment calls" with a "threat of suppression if they guess wrong"). No guess work was required here.

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[6] As the Third Circuit aptly stated, "[u]nder *Miranda*, the onus was not on [the suspect] to be persistent in her demand to remain silent. Rather, the responsibility fell to the law enforcement officers to scrupulously respect her demand." *United States v. Lafferty*, 503 F.3d 293, 304(3d Cir. 2007).

Under the state court's application of *Miranda* and its progeny, every time a suspect unequivocally invokes the right to remain silent, the police can ask follow-up questions to clarify whether he really, *really* wants to invoke the right and to parse the subject matter–"what specifically do you not want to talk about?" Such a practice is tantamount to endless re-interrogation.

The Sixth Circuit's decision in *McGraw v. Holland,* 257 F.3d 513 (6th Cir. 2001), where the defendant stated "I don't want to talk about it," illustrates the error of the state court's approach:

> In the criminal proceeding against Tina McGraw, the state trial court declined to hold the confession inadmissible under *Miranda* since TinA 'never demanded or requested to terminate the interview.' Although Tina said that she did not want to talk about the rape itself, in other words, her confession that she assisted in the rape was held to be admissible under *Miranda* because she never said that she did not want to talk about subjects other than the rape. This, in our view, was an unreasonable application of *Miranda* and its progeny.

Id. at 518.

Here, the state court's loose paraphrasing of the officer's question–"Plead the [F]ifth. What's that?"–as "asking defendant *what he meant* by pleading the Fifth" is unconvincing and an unreasonable determination of the facts. As the transcript reveals, the officer did not even pretend not to understand what Anderson meant. Instead, incredibly, he feigned ignorance of the Fifth

Amendment.

[8] Where the initial request to stop the questioning is clear, "the police may not create ambiguity in a defendant's desire by continuing to question him or her about it." *Barrett*, 479 U.S. at 535 n.5 (Brennan, J., concurring). By parsing Anderson's invocation into specific subjects, "the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. The net result is that such follow-up questions allowed the officer to avoid honoring the Fifth Amendment and, as in a right to counsel situation, enabled "the authorities through 'badger[ing]' or 'overreaching'–explicit or subtle, deliberate or unintentional–[to] wear down the accused and persuade him to incriminate himself." *Smith*, 469 U.S. at 98.

[9] Looking at this case through the AEDPA lens of deference, as we must, does nothing to change these conclusions. The state court's decision to ignore an unambiguous declaration of the right to remain silent is un unreasonable application of *Miranda*, as was the decision to allow continued questioning. *See Runnels*, 421 F.3d at 867. Finally, the state court's labeling of Anderson's statements as ambiguous and characterizing the officer's response as a legitimate clarifying inquiry were unreasonable determinations of fact.

V. THE STATE COURT'S DECISION WAS CONTRARY TO SUPREME COURT PRECEDENT BY FINDING A WAIVER BASED ON ANDERSON'S RESPONSES TO RE-INTERROGATION

[10] The state appellate court attempted to bolster its conclusion about Anderson's statements by claiming that he waived his right to remain silent in continuing to answer police questions after he stated, "I plead the Fifth":

> [W]hile words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed. . . . By continuing to talk to the police officers, defendant demonstrated a willingness to continue to discuss the case.

Put another way, the state court endorses the principle that once the officers ignored Anderson's unequivocal invocation of the Fifth Amendment, their questioning kept him talking and resulted in a waiver of his right to remain silent. This analysis directly contravenes Supreme Court precedent: "[U]nder the clear logical force of settleD precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith*, 469 U.S. at 100 (emphasis in original).

[11] *Smith* mandates that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot

be used to find a waiver or cast ambiguity on the earlier invocation. The Supreme Court's somewhat lengthy recitation of this principle is particularly instructive in this case:

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together. . . .
>
> With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all."

Id. at 98-99 (internal citations omitted) (emphasis, alteration and second ellipsis in original).

We are not faced with a situation where there was a break in questioning after the *Miranda* invocation.

Instead, police simply continued the conversation up to the point that Anderson said, "I'd like to have an attorney present." Only at that point did they stop the interrogation and turn off the recorder. But it was too late.

[12] We cannot simply suppress the portion of the interrogation that occurred after the invocation of the right to silence and before Anderson's purported re-initiation of the interrogation. Doing so would eviscerate the mandate to "scrupulously honor[]" the invocation of *Miranda* rights. We understand the phrase "scrupulously honor" to have practical meaning. For the "right to remain silent" to have currency, there must be some silence. The interrogation must stop for some period of time. *See Miranda*, 384 U.S. at 473-74; *Mosley*, 423 U.S. at 103-04. Although the Supreme Court has yet to tell us how long the break in questioning must last, in this case there was no cessation at all. Because the interrogation was continuous to that point, we need not determine whether Anderson waived his right to counsel after viewing a videotape of his alleged accomplice nor do we need to address his coercion claim.

[13] The prejudice from Anderson's confession cannot be soft pedaled, and the error was not harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The confession was central to the conviction. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most . . . damaging evidence that can be admitted against him." (internal quotation marks omitted)). Although deference must be given to state court determinations under AEDPA, we would be abdicating our responsibility to abide by Supreme Court precedent and to police the Constitution's boundaries were we to permit such an egregious violation of *Miranda* to go unchecked.

[14] The judgment of the district court is reversed and the case is remanded with instructions to grant the writ.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, with whom RAWLINSON, Circuit Judge, joins, concurring in the judgment:

The Supreme Court has taken pains to remind us that "[a]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (emphasis in original; quotation omitted). I write separately because I believe the majority opinion fails to observe this distinction," *id.*, in its treatment of the California Court of Appeal's ruling that Anderson's statements were "ambiguous in context." I concur in the result because the California Court of Appeal rendered an unreasonable determination of the facts when it ruled that the officer's feigned ignorance of the Fifth Amendment was a "legitimate clarifying question."

The first question we face is whether the state court acted contrary to or unreasonably applied Supreme Court law in holding that the police were entitled to clarify the statements Anderson made two hours into the interview. *See* 28 U.S.C. § 2254(d)(1). If Anderson had said, "I plead the Fifth" immediately after having been read his rights, there would be no room for debate. The right to remain silent clearly would have been invoked. Here, however, after having been read his rights, Anderson answered questions for some two hours before making the statements now in issue. He indicated that he "don't even wanna talk about this no more," and in the next breath said, "We can talk about it later or whatever." (Anderson says he does not argue that these statements were an unequivocal invocation of the right to remain silent.) He then proceeded to answer more questions. The conversation eventually turned to Anderson's drug use. At that point, he said he was "through with this" and wanted to be "taken in custody," even though he was *already* in custody. Then, when asked about his dope pipes, he said, "I plead the [F]ifth."

What did Anderson mean by asking to be "taken in custody," in light of the fact that he was already in custody? What did he mean when he said he would "talk about it later *or whatever*?" Did Anderson's "pleading the Fifth," coming as it did after two hours of talking mean that he wanted to terminate the interview in its entirety, or was he referring to the immediate question?

The California Court of Appeal ruled that Anderson's statements "were ambiguous in context" and that the officers thus were justified in seeking clarification. This conclusion was not "contrary to" Supreme Court law, because the Supreme Court has held that officers have no obligation to stop questioning a suspect who has made an ambiguous or equivocal invocation of *Miranda* rights. *Davis v. United States*, 512 U.S. 452, 461-62 (1994). Indeed, the Supreme Court has specifically stated that when a suspect makes an ambiguous statement "it will often be good police practice" for interviewing officers to ask "clarifying questions" about the suspect's meaning. *Id.* at 461.

Nor did the state court make an "unreasonable application" of this precedent in concluding that the officers were entitled to seek clarification from Anderson. The question before us is not whether we agree with the state court's assessment of the ambiguity of Anderson's statements, or even whether it is right or wrong, but only whether the court's decision on that point was unreasonable. In my view, it was not unreasonable.

It's a different story when it comes to assessing the legitimacy of the "clarifying question" that the officer asked. Instead of asking Anderson what he intended to convey, the officer responded to Anderson's "pleading the Fifth" by saying, "Plead the fifth. What's that?" As to this, the California Court of Appeal ruled as follows: By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question." By any measure, this is an unreasonable determination of the facts. The problem with the California Court of Appeal's ruling is that, in point of fact, the officer did *not* ask Anderson "what he meant." Rather, he feigned ignorance of what the Fifth Amendment *is*. One of the stated reasons for *Miranda's* requirement that officers inform suspects of their rights is to "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Miranda v. Arizona,* 384 U.S. 436, 468 (1966). Instead of asking a question aimed at clarifying Anderson's meanings, the officer pretended not to know about the very rights he informed Anderson of at the outset.

The California Court of Appeal's ruling that the officer asked a legitimate clarifying question is an unreasonable determination of the facts, and resulted in a decision that is contrary to *Miranda*. Having failed to clarify whether Anderson was exercising his right to terminate questioning, the officers could not lawfully continue the interview. Under *Miranda*, anything Anderson said after that point should have been suppressed. 384 U.S. at 479. It is for this reason that I would reverse the district court's denial of the writ.

BEA, Circuit Judge, concurring in part, dissenting in part:

I concur in the majority's holding that Anderson unambiguously invoked his privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

Anderson repeatedly invoked his right to remain silent–"I don't even want to talk about this no more"; "I'm through with this" and "I plead the fifth"–yet the police did not honor Anderson's right to remain silent until he finally requested an attorney. Only at that point did the police do what they should have done in the first–cease the interrogation.[1] Given that Anderson requested that the interrogation cease three times in rapid succession, no reasonable officer could have understood anything other than that Anderson wanted the interrogation to stop. Further, I agree with Judge Silverman that Officer O'Connor's response, "Plead the Fifth, what's that?" was not a genuine attempt to clarify whether Anderson wanted to invoke his right to remain silent.

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[1] Specifically, the conversation went as follows:

Defendant Jerome Anderson: I'd like to have an attorney present.

Where I part company with the majority's analysis is section V, where the majority concludes:

> We cannot simply suppress the portion of the interrogation that occurred after the invocation of the right to silence and before Anderson's purported re-initiation of the interrogation. Doing so would eviscerate the mandate to "scrupulously honor[]" the invocation of *Miranda* rights. We understand the phrase "scrupulously honor" to have practical meaning. For the "right to remain silent" to have currency, there must be some silence. The interrogation must stop for some period of time. *See Miranda*, 384 U.S. at 473-74; *Mosley*, 423 U.S. at 103-04. Although the Supreme

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Lt. Harry Bishop: Okey [*sic*]
Detective Ron Clemens: OK fine.
Anderson: Sorry, man.
Bishop: No, don't apologize.
Detective Tom O'Connor: okay, 7-12-97, about 22:45, ten forty-five, uh, p.m. on Saturday. This is it.

The police then turned the tape recorder off and stopped the interrogation.

> Court has yet to tell us how long the break in questioning must last, in this case there was no cessation at all. Because the interrogation was continuous to that point, we need not determine whether Anderson waived his right to counsel after viewing a videotape of his alleged accomplice nor do we need to address his coercion claim.

Majority Op. at 1397-98.

The reason I disagree is that the record shows the police did stop the interrogation after Anderson requested an attorney, and before Anderson himself re-initiated the conversation, as explained below. All this occurred before Anderson confessed to the murder. Thus, I conclude it was not error at all to admit his confession at trial, and the California Court of Appeal's denial of his petition for writ of habeas corpus was not contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

Approximately two hours and fifteen minutes into the interview, after Anderson was shown the videotape of his co-defendant Abe Santos saying Anderson was the one who shot Robert Clark, Anderson said, "I'd like to have an attorney present." The interrogating officers then did what they should have done back when Anderson first said, "I don't even wanna talk about this no more": they stopped the interrogation and turned the tape recorder off. Anderson had not confessed to the murder of Clark at this point.

But then Anderson changed his mind and re-initiated the conversation himself. The police advised Anderson four separate times that they could not speak with him because he had invoked his right to counsel, and five separate times Anderson insisted he wanted to talk to Lt. Harry Bishop saying in relevant part:

> Anderson: Oh, man, I want to talk to you. I need, I need to talk to you Harry. . . . Okay, I–I was just jokin'. I don't wanna talk–Or I want to talk to Harry, the bishop. You know the thing about the attorney, is . . . is wrong or whatever, I don't need an attorney. Is that fair to say so [you] guys don't get busted outta your jobs? . . . I don't want an attorney, I've changed my mind.

The officers were careful to ask clarifying questions to discern whether Anderson was making a knowing, intelligent and voluntary waiver of his rights to counsel and to remain silent:

Officer Brad McDonald: Okay. Has anybody in this room promised you anything?

Anderson: No, sir.

McDonald: Has anybody in this room threatened you for anything at all?

Anderson: No, sir.

McDonald: Do you feel intimidated by anybody in this room?

Anderson: No, sir.

McDonald: Do you feel that–Has anybody in this room, told you that if you didn't talk with us, or you did talk to us, that something' good was gonna happen?

Anderson: No, sir.

McDonald: Okay, so you've made the decision, that you want to talk to us and you do not want an attorney, is that correct?

Anderson: [Pause] Yes, sir.

McDonald: That's absolutely correct, now you kinda hesitated a little bit . . .

Anderson: Well . . .

McDonald: You don't want an attorney . . .

Anderson: Yes, sir.

McDonald: . . . right here in this room . . .

Anderson: Yes, sir.

McDonald: . . . right now, is that correct?

Anderson: Yes, sir.

McDonald: Okay. An' my name is Brad McDonald an' these guys have probably told ya' I'm the boss, right?

Anderson: Uh, no, sir, it's not.

McDonald: Okay, but I am.

Anderson: Okay.

McDonald: Okay. Then I think we're okay, I think he's unlawyered [sic]. Now what do you want to talk to Harry about?

Anderson: About . . . I guess the murder of Robbie Clark.

Anderson then eventually confessed to fatally shooting Robbie Clark.

This was a clear waiver of both Anderson's right to counsel, and his right to remain silent. Two cases are instructive. In *Edwards v. Arizona*, 451 U.S. 477, 481-84 (1981), Edwards was convicted of robbery, burglary, and first-degree murder after his confession was entered into evidence. After being read his *Miranda* rights, Edwards stated, "I want an attorney before making a deal." At that point, all questioning ceased. *Id.* at 479.

The next day, two different detectives came to question Edwards in jail. When he was told they were there, Edwards told the jail guard, "he did not want to talk to anyone." *Id.* The guard told Edwards he was obligated to talk to the detectives. *Id.* The detectives then advised Edwards of his *Miranda* rights again, and he agreed to talk to them, but said he did not want the discussion taped. Edwards then implicated himself in the crime after being confronted with the statement of a co-defendant who had implicated him. *Id.*

The Arizona Supreme Court affirmed his conviction and held Edwards had invoked both his right to remain silent and his right to counsel, but had waived both rights when he voluntarily gave his statement to the detectives after they informed him again of his *Miranda* rights. *Id.* at 480.

The Supreme Court reversed and held the use of Edwards's confession violated his Fifth Amendment rights as construed in *Miranda*. The Court held that when an accused requests an attorney, he may not be questioned unless an attorney has been made available or "the accused himself initiates further communication, exchanges, or conversation with the police." *Id.* at 485. Any waiver after an invocation of the right to remain silent or the right to an attorney must not only be voluntary, but must also "constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 482. Although the police appeared the day after Edwards had requested an attorney, the time elapsed between interrogations was not a factor the Court considered in determining the admissibility of his confession. The crucial factors were whether the second interrogation was initiated by Edwards (it was not); and, whether such initiation was voluntary (it was not, because the jail guard told Edwards he was required to speak to the police).

On the other hand, the later case of *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983), clarifies how an accused who has invoked his right to counsel can initiate a discussion and validly waive his rights to counsel and to remain silent. During the investigation of the death of a person whose body had been found in Bradshaw's wrecked pickup truck, Bradshaw was questioned at the police station. Bradshaw was advised of his *Miranda* rights. He was arrested for furnishing liquor to the victim, a minor, and again advised of his *Miranda* rights. *Id.* at 1041-42. Bradshaw denied he was driving the truck and asked for an attorney. *Id.*

Later that same day, while being transported in custody from the police station to a jail, Bradshaw asked a police officer, "Well, what is going to happen to me now?" *Id.* at 1042. The officer answered that Bradshaw did not have to talk to him and Bradshaw said he understood. They then discussed where Bradshaw was being taken and the offense with which he would be charged. The officer suggested that Bradshaw take a polygraph examination, which he did, after another reading of his *Miranda* rights. *Id.*

When the polygraph examiner told Bradshaw he did not believe Bradshaw was telling the truth, Bradshaw recanted his earlier story and admitted that he had been driving the truck in question and that he had consumed a considerable amount of alcohol and passed out at the wheel of the truck before it left the highway. *Id.* Bradshaw was charged with first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked. His motion to suppress his statement was denied, and he was found guilty after a bench trial. *Id.*

The Oregon Court of Appeals reversed, holding the inquiry Bradshaw made of the police officer while being transferred to jail did not "initiate" a conversation with the officer and therefore the statements growing out of this conversation should have been excluded from evidence under *Edwards v. Arizona*. *Id.* at1042-43. The Oregon Supreme Court denied review, without writing an opinion on the merits.

On direct appeal, the Supreme Court reversed, holding that by asking "Well, what is going to happen to me now?", Bradshaw "initiated" a further conversation. *Id.* at 1045. His statement evinced a willingness and a desire for a generalized discussion about the investigation. *Id.*

Because there was no violation of the *Edwards* initiation rule, the next inquiry was whether, in light of the totality of the circumstances, Bradshaw made a knowing and intelligent waiver of his right to have counsel present. The trial court, based on its first-hand observation of the witnesses, found a waiver and the Supreme Court found no reason to dispute that finding. *Id.* at 1045-47.

Here, Anderson himself initiated the conversation when, after being told by the police that they could no longer talk to him, he said, "Oh man, I want to talk to you. I need, I need to talk to you Harry [Lt. Bishop]." Anderson also made a knowing and intelligent waiver of his right to have counsel present when he said, "I don't want an attorney; I've changed my mind" and he wanted to talk to the police officers "about the murder of Robbie Clark."

It is unclear how long the interrogation was stopped after Anderson requested an attorney, and before Anderson asked to speak with Lt. Bishop. The record implies it did not appear to be a long period of time.

Although the Supreme Court has held the interrogation must stop for some period of time before a suspect can waive a properly invoked *Miranda* right, that amount of time has never been specified. In *Bradshaw*, we know the time was not long because when he re-initiated the conversation with the officer, Bradshaw was being transported from the police station to the jail shortly after he had requested an attorney. 462 U.S. at 1042. Even though not much time had elapsed since Bradshaw had requested an attorney, the Court had no problem finding Bradshaw was the one who re-initiated the conversation. There is no clearly established federal law mandating a particular amount of time the break in the interrogation must last. We have recently been reminded that where there is no such clearly established federal law, as determined by the Supreme Court of the United States, we are not allowed to invent such law. *See Carey v. Musladin*, 127 S. Ct. 649, 653 (2006) Hence, the relevant fact here is that Anderson re-initiated the conversation, not the duration of the break in the conversation.

Given that Anderson validly waived his right to counsel and his right to remain silent *before he confessed*, the admission of his confession was not error, and the California Court of Appeal's denial of his petition for writ of habeas corpus was not contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). For this reason, I respectfully dissent.

TALLMAN, Circuit Judge, with whom CALLAHAN, Circuit Judge, joins, dissenting:

Lewis Carroll was right: "When I use a word . . . it means just what I choose it to mean, neither more nor less." Lewis Carroll, Alice's Adventures in Wonderland 163 (Donald J. Gray ed., W.W. Norton 1973) (1871). My colleagues in the majority fixate on the words "plead the Fifth" lifted in isolation from a portion of the transcribed interview without giving the required level of deference to the trial court's findings of fact after an evidentiary hearing, which included the entire tape recording and the testimony of the interrogators. No one disputes that Jerome Alvin Anderson, a known felon on parole, admitted to killing his acquaintance and friend, Robert Clark: Anderson admitted, "I shot [Clark]." Nor does anyone dispute that Anderson answered questions for nearly two and one-half hours before making the statement, "I plead the Fifth."

The California courts examined Anderson's statement in the full context of his confession. Following an evidentiary hearing, the Shasta County Superior Court Judge made a factual finding that "while the defendant articulated words *that could, in the isolation, be viewed as an invocation of his right to remain silent*, the defendant did not intend to terminate the interview." (Emphasis added). In affirming the trial court's decision to deny Anderson's motion to suppress his later confession because it was knowing and voluntary, the California Court of Appeal neither unreasonably applied clearly established Supreme Court precedent, nor made an unreasonable determination of facts. The state courts' conclusion that Anderson's comments were ambiguous in context was not an unreasonable application of clearly established Supreme Court precedent. Nor was their conclusion that the detective's follow-up question, "Plead the Fifth. What's that?," was a permissible clarification question an unreasonable determination of fact. I respectfully dissent.

I

We may grant habeas relief only if the California Court of Appeal acted contrary to or unreasonably applied clearly established Supreme Court precedent, or made an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d); *Lockyer v. Andrade,* 538 U.S. 63, 70-73 (2003). "[C]learly established Federal law under § 2254(d)(1) [(the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'))] is the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer,* 538 U.S. at 71-72 (internal quotation marks omitted). The Court has stated that a "state court decision is contrary to . . . clearly established [Supreme Court] precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 73 (internal quotation marks omitted).

There is an open question in Supreme Court jurisprudence on issues involving the invocation of a suspect's Fifth Amendment right to remain silent. Clearly established Supreme Court precedent in the arena of the right to remain silent is *Miranda v. Arizona,* 384 U.S. 436 (1966), and *Michigan v. Mosley,* 423 U.S. 96, 101 (1975). In *Miranda,* the Supreme Court held that "[i]f [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 385 U.S. at 473-74. Once a defendant has invoked his right to remain silent, that right must be "scrupulously honored." *Mosley*, 423 U.S. at 103-04. While the Supreme Court has addressed the substance of the right to remain silent in *Miranda* and *Mosley*, at no time has the Court addressed how that right is to be invoked.

In comparison, under clearly established Supreme Court precedent, a suspect's statements to invoke his Fifth Amendment right to *counsel* under *Miranda* must be clear and unequivocal. *See Davis v. Alaska*, 512 U.S. 452, 459 (1994). The determination of whether the suspect clearly invoked his right to counsel requires an objective inquiry. *Id.* at 458-59. The suspect must, "at a minimum, [give] some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* at 459 (internal quotation marks omitted). A statement is ambiguous when a "reasonable officer *in light of the circumstances* would have understood only that the suspect *might* be invoking the right to counsel." *Id.* (first emphasis added).

The United States Supreme Court has never declared its right to counsel principles applicable to invoking the right to silence, and under AEDPA that precedent was not "clearly established" when the California Court of Appeal rendered its decision. *See Bui v. Dipaolo*, 170 F.3d 232, 239 (1st Cir. 1999) (recognizing that *Davis* was concerned only with the right to counsel, and not the right to remain silent). Indeed, in prior cases, we have declined to determine whether the rule in *Davis* when invoking the right to counsel applied with equal force to the right to remain silent. *See Arnold v. Runnels*, 421 F.3d 859, 866 n.8 (9th Cir. 2005); *United States v. Soliz*, 129 F.3d 499, 504 n.3 (1997), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) (per curiam); *Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996). Other circuits have made that leap. *See, e.g., Arnold*, 421 F.3d at 870 & n.1 (Callahan, J., dissenting) (collecting cases).

In circumstances where there is no "clear-cut Supreme Court rule that certain magic words automatically bring all questioning to a halt–regardless of the circumstances surrounding the interrogation," *Anderson v. Terhune*, 467 F.3d 1208, 1213 (9th Cir. 2006), *reh'g en banc granted*, 486 F.3d 1155 (2007), we simply cannot say that the California Court of Appeal unreasonably applied clearly established Supreme Court precedent. *See Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (concluding that the state court's determination was not an unreasonable application of Supreme Court precedent because there was no Supreme Court precedent addressing that area of law). Invoking the lyrics of a popular Country-Western song in lieu of Supreme Court authority is not good enough under AEDPA.

Nor can we grant habeas relief because, when lacking clearly established Supreme Court precedent, the California Court of Appeal looked to Supreme Court law in another context for guidance. In holding that Anderson's statement was ambiguous, and that the detective's follow-up question could reasonably be interpreted as a "legitimate clarifying question," the

California Court of Appeal applied the Supreme Court's precedent in *Davis*. It looked at the totality of the circumstances to determine that a reasonable officer could have understood only that Anderson *may* have intended to invoke his Fifth Amendment right to remain silent. *See Davis*, 512 U.S. at 459. Given the lack of a holding from the Supreme Court addressing invocation of the Fifth Amendment right to remain silent, it cannot be said that the California Court of Appeal applied a standard that was "contrary to" clearly established Supreme Court precedent. *Cf. Musladin*, 127 S. Ct. at 654.

II

Having failed to heed AEDPA and to acknowledge the lack of clearly established Supreme Court authority on invoking one's Fifth Amendment right to silence, the majority proceeds to fault the California courts for considering Anderson's statement in the context of the interview. Maj. Op. at 1389. Despite the majority's misconceptions, we simply cannot pluck the words "I plead the Fifth" out of the transcript and declare we have an unambiguous statement. *See* Maj. Op. at 1389 ("Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law."). It defies common sense to determine what an objectively reasonable officer would have understood without looking at the totality of the interview. *See Davis*, 512 U.S. at 459.

As Judge Silverman aptly displays, *see* Silverman Concurrence at 1399, when considered in context, the state courts reasonably concluded that there is ambiguity in Anderson's statement.[1] While the majority may disagree with the conclusion, that is simply insufficient to declare the California Court of Appeal's holding "unreasonable." We have been told before that objectively unreasonable means something more than we think the state courts were wrong. "[A]n *unreasonable* application of federal law is different from an *incorrect* application." *Williams v. Taylor*, 529 U.S. 362, 410 (2000); *see also Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007) (stating that under AEDPA the petitioner must meet the "substantially higher threshold" of unreasonableness); *Brown v. Payton*, 544 U.S. 133, 143 (2005) (denying AEDPA relief because "[e]ven on the assumption that [the state court's] conclusion was incorrect, it was not unreasonable"); *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam) ("We may not grant respondent's habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless. . . ."); *Lockyer*, 538 U.S. at 75 (reversing us because, by defining "unreasonable application" as "clear error," we "fail[ed] to give proper deference to state courts by conflating error (even clear error) with unreasonableness"); *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (reversing us because we failed to observe the distinction between an incorrect application and an unreasonable application).

Therefore, even if we could grant habeas relief in the absence of clearly established Supreme Court precedent, I would deny the petition. The California courts' application of *Davis* and its finding of ambiguity was reasonable.

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[1] Where I part company with my brother Silverman is in his conclusion that the sheriff's detective was being sarcastic and already understood what Anderson meant by "pleading the Fifth" when he asked for clarification. *See infra*, § III. In the face of the trial judge's factual determination that an ambiguity existed triggering the detective's justification for seeking clarification, AEDPA dictates that we defer to the trial court.

III

The only other way to grant Anderson habeas relief requires the majority to overrule the California Court of Appeal's factual finding. My colleagues have to find that the state court conclusion was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). But in considering Anderson's motion to suppress, the Shasta County trial court considered live testimony from the interrogating officers and heard the audiotapes of the confession. The California Court of Appeal then adopted the trial court's factual finding verbatim:

> Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in . . . isolation, be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview. The interrogating officer did not continue or reinitiate the interview by posing the question. "Plead the Fifth. What's that?" The questions can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate

> without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed.

Moreover, the California Court of Appeal took note of an interrogating officer's testimony during the hearing on the motion to suppress. "[T]he interrogating officer testified he believed that in saying, "I plead the Fifth[,]" [Anderson] was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation."

This is not a situation where a suspect clearly states his or her intent (such as when a witness invokes his Fifth Amendment right to refuse to answer a specific question at trial). *Cf. Arnold*, 421 F.3d at 861-62 (finding that Arnold unequivocally invoked his right to remain silent when he told the officers that he did not want to talk on tape). Instead, in response to a direct question about his drug use, Anderson, after willingly answering questions about the murder for two and one-half hours, responded "I plead the Fifth." The officers did not respond by asking Anderson more questions about his drug use. Rather, the officer asked, "Plead the Fifth. What's that?" Having considered all of the evidence, the Shasta County Superior Court found as a matter of fact that Anderson did not intend to end the interview and that the officers asked a legitimate clarifying question. Anderson does not challenge the state court's fact-finding process, and he has failed to rebut the trial court's factual finding by clear and convincing evidence, as he must under AEDPA. *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). Admittedly, the detective could have phrased his clarifying question differently, and perhaps he should have uttered it with less sarcasm, but a poorly-phrased question without more is not grounds to grant federal habeas corpus relief.

AEDPA mandates comity and deference to California's decision that Anderson's confession was voluntary. Rejecting it, the majority decrees that a murderer "is to go free because the constable has blundered." *See People v. Defore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.).

I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,
Petitioner-Appellant,

v.

C.A. TERHUNE, Warden,
Respondent-Appellee.

No. 04-17237

D.C. No.
CV-00-002494-
WBS
OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief Judge, Presiding
Submitted December 5, 2005*
San Francisco, California
Filed November 8, 2006

Before: Alex Kozinski and M. Margaret McKeown,
Circuit Judges, and Michael R. Hogan** District
Judge.

Opinion by Judge Hogan;
Dissent by Judge McKeon

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* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that a state court's conclusions that a defendant's statements that "I don't want to talk about this no more," and "I plead the fifth," were ambiguous; and that the interrogating officer's retort–"Plead the fifth. What's that?"–sought clarification, were not unreasonable under the Antiterrorism and Effective Death Penalty Act (AEDPA).

Appellant Jerome Anderson, who was convicted of special circumstance murder in California state court and unsuccessful in his state court appeals, petitioned for a writ of habeas corpus in federal district court on the grounds that (1) he was denied his constitutional right to remain silent; and (2) he was denied due process by the introduction of his involuntary confession into evidence, and by the exclusion of evidence of coercion in the interrogation process. Anderson claimed that the interrogating officers coerced his confession because they withheld basic needs, such as cigarettes and warm clothing, until he agreed to talk. The state court concluded that Anderson's statements to police while in custody that "I don't want to talk about this no more," and "I plead the fifth," were ambiguous; and that the interrogating officer's retort–"Plead the fifth. What's that?"–sought clarification. Once Anderson stated "I'd like to have an attorney present," the interrogating officers stopped the interrogation and turned the tape recorder off. However, Anderson continued the conversation and asked what was going to happen to him. In response to the officers' statements that they

could not talk to him, Anderson clarified that he was just joking and stated "I don't want an attorney." The district court denied Anderson's petition.

Anderson appealed.

[1] If a suspect indicates in any manner during questioning that he wishes to remain silent, interrogation must cease. Any statement taken after invocation of the privilege would constitute the product of compulsion. However, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants to invoke the privilege. **[2]** Anderson arguably invoked his right to remain silent on two occasions when he stated, "I don't want to talk about this no more," and, "I plead the fifth." Anderson did not express a desire to remain silent in response to the clarifying question. **[3]** To reverse under AEDPA, the court of appeals would have to find that the state court's factual findings were unreasonable, and Anderson rebutted them with clear and convincing evidence. Or, in the alternative, the court of appeals would have to hold that this determination was a question of law, and the state court's decision unreasonably applied clearly established federal law. Namely, there would have to be some clear-cut Supreme Court rule that certain magic words automatically bring all questioning to a halt–regardless of the circumstances surrounding the interrogation. Here, neither was the case. **[4]** The state court found, for better or for worse, that Anderson's attempted invocation of his right to remain silent was ambiguous and that the officer's following question legitimately sought clarification. Absent a bright-line rule from the

Supreme Court, the state-court conclusion was a reasonable determination of the facts.

[5] Once Anderson stated "I'd like to have an attorney present," the interrogating officers stopped the interrogation and turned the tape recorder off. However, Anderson unilaterally continued the conversation and asked what was going to happen to him. Accordingly, the interrogating officers were not prohibited from further questioning. In response to the officers' statements that they could not talk to him, Anderson clarified that he was just joking and stated "I don't want an attorney." Therefore, Anderson validly waived his right to counsel.

[6] The record did not support a finding of an involuntary confession. [7] Anderson was not prevented from presenting evidence of the physical and psychological environment that yielded the confession. Exclusion of purported expert testimony of Anderson's self-image and other aspects of the voluntariness of the confession, if error, was harmless. The judgment of the district court had to be affirmed.

Judge McKeown dissented, writing that it was rare to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent; under even the narrowest construction of AEDPA, the state court erred in failing to recognize this constitutional violation.

COUNSEL

Charles M. Bonneau, Sacramento, California, for the petitioner-appellant.

Bill Lockyer, Attorney General; Robert R. Anderson, Chief Assistant Attorney General; Mary Jo Graves, Senior Assistant Attorney General; Stephen G. Herndon, Supervising Deputy Attorney General; Brian R. Means, Supervising Deputy Attorney General; Craig S. Meyers, Deputy Attorney General; Sacramento, California, for the respondent-appellee.

OPINION

HOGAN, District Judge:

Petitioner, Jerome Alvin Anderson, appeals the district court's order denying his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Anderson challenges his conviction of special circumstance murder on the grounds that (1) he was denied his constitutional right to remain silent; and (2) he was denied due process by the introduction of his involuntary confession into evidence, and by the exclusion of the evidence of coercion in the interrogation process.

Facts

Anderson and the victim, Robert Clark, were friends. On the morning of July 9, 1997, a mutual acquaintance, Patricia Kuykendall, discovered that her car had been stolen. Anderson visited Kuykendall's apartment that day and informed Kuykendall that Clark had a habit of borrowing cars, duplicating keys and stealing them later.

Anderson left to bring Clark back to Kuykendall's apartment. Kuykendall and petitioner confronted Clark about the car. Clark denied involvement in the theft. As Kuykendall called the police, Clark left. About ten minutes later, Anderson and Kuykendall's roommate, Abe Santos, followed after Clark.

About 12:30 or 1:00 p.m. on that afternoon, an employee at Carl's Jr. waited on three people in a white Ford Mustang at the drive-through window. The employee identified Anderson as the driver. At about 1:05 p.m. witnesses noticed a white Mustang with black trim and tinted windows on East Stillwater Road. One witness specifically saw Anderson standing behind the car and two other men standing by the car.

Clark's body was discovered by the side of East Stillwater Road at about 2:30 p.m. He had been shot in the head four times. A methamphetamine pipe lay next to him, and a cigarette lighter was in his hand. Two pieces of hamburger and a fresh cigarette butt were also near the body, as well as spent .22 shell casings. Kuykendall's key was discovered in Clark's pocket.

A search of defendant's car, a white Ford Mustang with black trim and tinted windows, revealed that the tire tracks found near the body were similar to the tire tracks it made. The search also revealed two live .22 rim fire casings under the seats similar to the spent casing found near Clark's body. An analysis of the clothes Anderson wore that day revealed that three small blood stains on his shorts were consistent with Clark's DNA and inconsistent with Anderson's or Santos' DNA.

Authorities took defendant into custody for a parole violation on July 12, 1997, at approximately 8:00 p.m. Officers interviewed Anderson for approximately three and a half hours. The interrogation included the following discussion with Detective O'Connor:

O'Connor: You act like you're cryin' like a baby, an', you can't cry for someone that was no good . . . an' you killed him for a good reason.

Anderson: No, way. I – You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.

O'Connor: Right now, you show your remorse.

Anderson: I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No way I would do it.

O'Connor: Were you high that day?

Anderson: No, sir. I – probably was later on. Yes.

O’Connor: Did you have any dope with you that . . . that day?

Anderson: No, sir.

O’Connor: No, dope at all? What do you smoke with?

Anderson: I smoke with my . . . my fingers.

O’Connor: When you smoke your dope what do you do with that? How do you smoke that?

Anderson: You smoke it with pipes and stuff like that.

O’Connor: Okay. What kind of pipes?

Anderson: Lines.

O’Connor: What kind of pipes?

Anderson: N’ah . . . I would – I –

O’Connor: Well, what kind of pipes?

Anderson: Uh! I’m through with this. I’m through. I wanna be taken in custody, with my parole . . .

O’Connor: Well, you already are. I wanna know what kinda pipes you have?

Anderson: I plead the fifth.

O'Connor:	Plead the fifth. What's that?
Anderson:	No, you guys are wrong. You guys are wrong. You guys have – I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right. [Door opens/Closes]
O'Connor:	We're not makin' anything up.
Anderson:	Sir, sure you are.
O'Connor:	What are we makin' up?
Anderson:	You're tellin' me that I didn't have tears in my eyes.
O'Connor:	Yeah.
Anderson:	You're tellin' me, okay, that, uh, uh, Abe said I kilt (sic) him. That's a lie.

Officers then showed Anderson a videotaped interview in which Abe Santos confessed to watching defendant shoot Clark. Defendant eventually confessed.

Right to Remain Silent

Anderson asserts that he was denied his constitutional right to remain silent during this exchange. The state court concluded that while the defendant articulated words that could, in isolation, be viewed as an invocation of his right to remain silent, given the totality of the circumstances, the defendant did not intend to terminate the interview. The state appellate court quoted the reasoning provided by the trial court:

> The interrogating officer did not continue or reinitiate the interview by posing the question: "plead the fifth. What's that?" The questions can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion.

The appellate court further reasoned that "the interrogating officer testified he believed that in saying, 'I plead the fifth' defendant was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation."

[1] The state court thus determined that the detective's further questioning was not inappropriate.

> In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying

question.

If a suspect indicates in any manner during questioning that he wishes to remain silent, interrogation must cease. *Miranda v. Arizona*, 384 U.S. 436, 473-74, (1966). Any statement taken after invocation of the privilege would constitute the product of compulsion. *Id.* at 474. However, "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants [to invoke the privilege]." *Davis v. United States*, 512 U.S. 452, 461 (1994) (holding that the statement, "Maybe I should talk to a lawyer," is not necessarily a request for counsel). Clarifying questions "minimize the change of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement." *Id.* "If the suspect's statement is not unambiguous or unequivocal . . . the officers have no obligation to stop questioning." *Id.* 461-62.

[2] Here, Anderson arguably invoked his right to remain silent on two occasions. First, he stated, "I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more,[1] and then he stated, "I plead the fifth." Anderson did not express a desire to remain silent in response to the clarifying question. As noted above, the state court concluded that Anderson's comments were ambiguous and that the interrogating officer's question sought clarification. These are the state-court determinations we must review on appeal.

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[1] Anderson does not argue that this was an unequivocal invocation of his right to remain silent.

If this case were not before us on 28 U.S.C. § 2254 habeas review, we might be writing a very different opinion. There's definitely more than one way to interpret Detective O'Connor's interrogation. And, the state court's interpretation might not be the most plausible one. But in federal habeas proceedings under AEDPA,[2] great deference is given to state-court factual and legal determinations.

To reverse under AEDPA, we would have to find the state-court conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Rice v. Collins*, 126 S. Ct. 969, 974-76 (2006) (holding that it was *not* unreasonable for a state court to determine that a prosecutor's explanations were race-neutral for *Batson* purposes). Further, state-court factual findings must be "presumed to be correct," and the habeas petitioner "must rebut[] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El v. Drekte*, 125 S. Ct. 2317, 2325 (2005).

AEDPA similarly requires us to give considerable deference to a state appellate court's legal judgments. In reviewing questions of law, we may not reverse under AEDPA unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This inquiry is "straightforward." *Lockyer v. Andrade*, 538 U.S. 63, 74-75 (2003). We look to the Supreme Court's "holdings, as opposed to dicta," to determine whether clearly established federal law exists. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). And, if clearly established federal law applies, it's not enough for the state court to incorrectly apply the law: "[A]n *unreasonable* application of federal law is different from an incorrect *application*." *Id*. at 409; *see also id*. at 411 ("[A] federal habeas court may not issue a writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

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[2] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (1996) (amending 28 U.S.C. § 2254.) AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)).

[3] We're thus left with only two ways to reverse: First, we would have to find that the state court's factual findings were unreasonable, and petitioner rebutted them with clear and convincing evidence. Or, in the alternative, we would have to hold that this determination was a question of law, and the state court's decision unreasonably applied clearly established federal law. Namely, there would have to be some clear-cut Supreme Court rule that certain magic words automatically bring all questioning to a halt–regardless of the circumstances surrounding the interrogation. Here, neither is the case.

[4] The state court found, for better or for worse, that Anderson's attempted invocation of his right to remain silent was ambiguous and that the officer's

following question legitimately sought clarification. Absent a bright-line rule from the Supreme Court, the state-court conclusion is a reasonable determination of the facts.

Right to Counsel

[5] Anderson also contends that he validly invoked his right to counsel and did not subsequently waive this right prior to the confession. Once Anderson stated "I'd like to have an attorney present," the interrogating officers stopped the interrogation and turned the tape recorder off. However, Anderson unilaterally continued the conversation and asked what was going to happen to him. Accordingly, the interrogating officers were not prohibited from further questioning. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (holding that the question, "Well, what is going to happen to me?" is enough to "initiate" conversation after requesting a lawyer). In response to the officers' statements that they could not talk to him, Anderson clarified that he was just jokin[g]" and stated "I don't want an attorney. I've changed my mind." Therefore, Anderson validly waived his right to counsel. *See Id.* at 1046.

Coercion Claims

[6] Anderson next argues that the interrogating officers coerced his confession because they withheld basic needs, such as cigarettes and warm clothing, until he agreed to talk, exploited his mental condition brought on by chronic drug use, threatened him with the death penalty and ignored his requests to remain silent. The record does not support a finding of an involuntary confession. *See United States v. Coleman*, 208 F.3d 786,

791 (9th Cir. 2000) (heroin withdrawal and physical discomfort not enough to establish involuntariness of confession); *United States v. Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) (promise to recommend leniency not enough).

[7] Finally, Anderson argues that the trial court improperly excluded evidence of coercion. The state court reasonably concluded that the criminal trial court did not violate the holding of *Crane v. Kentucky*, 476 U.S. 683, 688-91 (1986). Petitioner was not prevented from presenting evidence of the physical and psychological environment that yielded the confession. Exclusion of purported expert testimony of petitioner's self-image and other aspects of the voluntariness of the confession, if error, was harmless.

* * *

The standard of review is critical here. Under AEDPA, we must give deference to state-court factual and legal determinations, which in this case are reasonable in light of the evidence presented in the state-court proceedings and the lack of clearly established federal law to the contrary. The district court's judgment denying Anderson's petition for writ of habeas corpus is therefore **AFFIRMED**.

McKEOWN, Circuit Judge, dissenting:

It is likely that few Americans can profess fluency in the Bill of Rights, but the Fifth Amendment is surely an exception.[1] From television shows like "Law & Order" to movies such as "Guys and Dolls," we are steeped in the culture that knows a person in custody has "the right to remain silent." *Miranda* is practically a household word. And surely, when a criminal defendant says, "I plead the Fifth," it doesn't take a trained linguist, a Ph.D., or a lawyer to know what he meant.

Here, Anderson said, "I don't even wanna talk about this no more," "Uh! I'm through with this," and "I plead the Fifth." The officer did not stop questioning but instead responded, "Plead the Fifth. What's that?", continued the questioning, and ultimately obtained a confession. It is rare to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent. Under even the narrowest construction of AEDPA,[2] the state court erred in failing to recognize this constitutional violation. I respectfully dissent from the majority's view that there was some ambiguity in Anderson's unequivocal invocation of the Fifth Amendment such that clarifying questions were permitted.

---

[1] As early as 1955, the Supreme Court recognized that "in popular parlance and even legal literature, the term 'Fifth Amendment' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination." *Quinn v. United States*, 349 U.S. 155, 163 (1955); *accord In re Johnny V.*, 149 Cal. Rptr. 180, 184, 188 (Cal. Ct. App. 1978) (holding that the statement "I'll take the fifth" was an assertion of the Fifth Amendment privilege.)

[2] Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), a writ of habeas corpus may not be granted unless the state court's decision (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The continued questioning violated the Supreme Court's bright-line rule established in *Miranda v. Arizona*. Once a person invokes the right to remain silent, all questioning must cease:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

384 U.S. 436, 473-74 (1966).

The expansion of legitimate clarifying questions to cover this situation is contrary to, and an unreasonable application of, clear Supreme Court precedent. Additionally, even a cursory examination of the interrogation transcript reveals that the state court made an unreasonable determination of the facts in evaluating Anderson's *Miranda* claim. Anderson's invocation was not ambiguous, and only one reasonable conclusion can be gleaned from his statements, especially his last declaration, "I plead the Fifth:" he invoked his right to remain silent and wanted to end the interrogation.

I. THE INTERROGATION

After an initial interview about the murder, Anderson was brought to the police station for further questioning. The relevant portion of the transcript is so extraordinary that it bears repeating. Despite clear and repeated invocations of his right to remain silent, the officers continued to question Anderson about the murder:

> Officer: You act like you're cryin' like a baby, an', you can't cry for someone that was no good . . . an' you killed him for a good reason.
>
> Anderson: No, way. I – You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.
>
> Officer: Right now, you show your remorse.

Immediately after this exchange, the officer continued to interrogate Anderson regarding his drug use on the day of the murder, including whether Anderson had used pipes. This questioning is significant because the murder victim was found with a pipe next to him. The entire conversation was about the murder. In response to this questioning, Anderson unambiguously indicated that he wanted to end the interrogation by stating that he was "through with this," wanted to "be taken into custody" and "I plead the Fifth":

Anderson: I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No way I would do it.

Officer: Were you high that day?

Anderson: No, sir. I – probably was later on. Yes.

Officer: Did you have any dope with you that . . . that day?

Anderson: No, sir.

Officer: No, dope at all? What do you smoke with?

Anderson: I smoke with my . . . my fingers.

Officer: When you smoke your dope what do you do with that? How do you smoke that?

Anderson: You smoke it with pipes and stuff like that.

Officer: Okay. What kind of pipes?

Anderson: Lines.

Officer: What kind of pipes?

Anderson: N'ah . . . I would – I –

Officer: Well, what kind of pipes?

Anderson: Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . .

Officer: Well, you already are. I wanna know what kinda pipes you have?

Anderson: I plead the [F]ifth.

Officer: Plead the [F]ifth. What's that?

Anderson: No, you guys are wrong. You guys are wrong. You guys have – I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right. [Door opens/Closes]

Officer: We're not makin' anything up.

Anderson: Sir, sure you are.

Officer: What are we makin' up?

Anderson: You're tellin' me that I didn't have tears in my eyes.

Officer: Yeah.

Anderson: You're tellin' me, okay, that, uh, uh, Abe said I kilt (sic) him. That's a lie.

The questioning continued until Anderson asked for a lawyer: "I'd like to have an attorney present." At that juncture, the police turned off the tape recorder and, somewhat suspiciously, following this hiatus, the officer concluded that Anderson wanted to reinitiate the discussion. The questioning, which took place over a three-hour period, led to a confession by Anderson.

II. IN CLEAR VIOLATION OF *MIRANDA*, THE STATE COURT UNREASONABLY CONCLUDED THAT ANDERSON'S INVOCATION ("I PLEAD THE FIFTH") WAS AMBIGUOUS

Against this backdrop, the state court accurately recognized that Anderson unambiguously invoked his right to remain silent when he stated, "I plead the Fifth," but then went on to eviscerate that conclusion by stating that the comments were "ambiguous in context":

> In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officers asked a legitimate clarifying question.

Using "context" to make an unambiguous invocation ambiguous defies both common sense and established Supreme Court law.

Although the Supreme Court has observed that in invoking a constitutional right, "a suspect need not 'speak with the discrimination of an Oxford don,'" *Davis v. United States*, 512 U.S. 452, 459 (1994) (quoting *id.* at 476 (Souter, J., concurring)), Anderson would meet even this erudite standard. This is not a case where the officers or the court were left scratching their heads as to what Anderson meant. Nothing was ambiguous about the statement "I plead the Fifth."[3] That invocation should have brought an immediate end to questioning. *Miranda*, 384 U.S. at 473.

Instead of honoring the request, the interrogating officers decided to "play dumb," hoping to keep Anderson talking by responding, "Plead the Fifth. What's that?" The effort to keep the conversation going was almost comical. The officer knew what "I plead the Fifth" meant. It is baffling that the state court determined that "[b]y asking defendant what he meant by pleading the Fifth, the officers asked a legitimate clarifying question." Nothing needed clarification. What about the words "I plead the Fifth" would be unclear, ambiguous, or confusing to a reasonable officer? *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (holding in the context of the invocation of the right to counsel that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous"). Rather, the officer hoped Anderson would explain more about the murder, the exact topic he did not want to talk about. They knew that continuing the interrogation was "reasonably likely to elicit an incriminating response" from Anderson. *Rhode Island v. Innis*, 446 U.S. 291, 303 (1986). And they were right.

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[3] *See Arnold v. Runnels*, 412 F.3d 859, 866 (9th Cir. 2005) (holding, with respect to a defendant who said that he did not want to talk on tape, that "it is difficult to imagine how much more clearly a layperson . . . could have expressed his right to remain silent.").

The Supreme Court has countenanced clarifying questions only to ascertain whether the suspect actually invoked the right to remain silent. *See, e.g., Miranda*, 384 U.S. at 444-45 (focusing only on the threshold question of whether the accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking" when deciding whether police had honored their Fifth Amendment rights); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (focusing on whether accused had actually "expressed his desire" for, or "clearly asserted" his invocation of his Fifth Amendment rights); *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (holding that "[t]his case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance"). Ignoring this principle, the state court found that the comments were ambiguous "because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all."

While the majority defers to this far-fetched reasoning, the rationale for the state court decision falls of its own weight. The police did not ask Anderson what subject he did not want to discuss; nor did any of their follow-up questioning address this topic. The state court's characterization is a fanciful reimagining of the colloquy between Anderson and the police, and under AEDPA, certainly an unreasonable determination of the facts. Significantly, the question can hardly be characterized as one to clarify or double-check whether Anderson invoked his right to remain silent, the only legitimate clarifying inquiry authorized by Supreme Court precedent. *Smith*, 469 U.S. at 95. The state court's conclusion that "[i]t was the defendant, not the interrogators, who continued the discussion," ignores the bedrock principle that the interrogators should have stopped all questioning. A statement taken after the suspect invoked his right to remain silent "cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474. Finally, even taken on its own terms, the majority's factual hair-splitting is mistaken. It makes no sense to split hairs and say that maybe, just maybe, Anderson wanted to talk about the murder and not about his drug use because, in fact, the drug use was inextricably intertwined with the murder. It is precisely this kind of hair-splitting that the Supreme Court wanted to avoid when it fashioned the bright-line rule in *Miranda*. *Davis*, 512 U.S. at 461 (noting that the benefit of the bright-line rule is the "clarity and ease of application" that can be applied by officers in the real world without "unduly hampering the gathering of information" by forcing them to make "difficult judgment calls" with a "threat of suppression if they guess wrong"). No guess work was required here.

But under the majority's interpretation of *Miranda* and its progeny, every time a suspect unequivocally invokes the right to remain silent, the police can ask follow-up questions to clarify whether he really, *really* wants to invoke the right and to parse the subject matter–"what specifically do you not want to talk about?" The majority's holding allows the police to turn the Fifth Amendment into a game of "Twenty Questions," permitting the police to continue the interrogation and forcing the suspect to take a multiple choice quiz. Such a practice is tantamount to endless re-interrogation.

Where the initial request to stop the questioning is clear, "the police may not create ambiguity in a defendant's desire by continuing to question him or her about it." *Barrett*, 479 U.S. at 535 n.6 (Brennan, J., concurring). By parsing Anderson's invocation into specific subjects, the police "failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Michigan v. Mosley*, 423 U.S. 96, 105-06 (1975). The net result is that such follow-up questions allow "the authorities through 'badger[ing]' or 'overreaching'–explicit or subtle, deliberate or unintentional–[to] wear down the accused and persuade him to incriminate himself." *Smith*, 469 U.S. at 98.

Looking at this case through the AEDPA lens of deference does nothing to change my conclusions. The state court's decision to ignore an unambiguous declaration of the right to remain silent is directly contrary to *Miranda*. To the extent the question is one of interpretation of *Miranda* and related Supreme Court precedent, the state court's interpretation is flatly unreasonable. *See Runnels*, 421 F.3d at 867. And to characterize Anderson's statements as ambiguous was certainly an unreasonable finding of fact.

III. THE STATE COURT ACTED CONTRARY TO SUPREME COURT PRECEDENT BY USING ANDERSON'S RESPONSES TO RE-INTERROGATION TO FIND A VALID WAIVER

The state appellate court attempted to bolster its conclusion about Anderson's statements by claiming that he waived his right to remain silent in continuing to answer police questions after he stated, "I plead the Fifth":

> By continuing to talk to the police officers, defendant demonstrated a willingness to continue to discuss the case . . . . Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed.

Put another way, the state court suggests that because the officers ignored Anderson's unequivocal invocation of the Fifth Amendment, their questioning caused him to keep talking, resulting in a waiver of his right to remain silent. This analysis directly contravenes clear Supreme Court precedent, thereby providing another ground upon which to grant the writ under § 2254(d)(1).

Smith mandates that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation. The Supreme Court's somewhat lengthy but crystal clear recitation of this principle bears repeating:

> Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together. . . .
>
> With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all."

Smith, 469 U.S. at 98-99 (internal citations omitted).

The prejudice from Anderson's confession cannot be soft pedaled, and the error was not harmless. *Brecht v. Anderson*, 507 U.S. 619, 623 (1993). I would grant the writ of habeas corpus.

APPENDIX C

FILED
September 28 2004
Clerk, U.S. District Court
Eastern District of California
By____________________
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JEROME ALVIN ANDERSON,

Petitioner, No. CIV S-00-2404 WBS DAD P

vs.

C. A. TERHUNE,

Respondent. FINDINGS & RECOMMENDATIONS

________________________________/

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1998 conviction on the charge of special circumstance murder. He seeks relief on the grounds that: (1) he was denied his constitutional right to remain silent when interrogating officers ignored both his request to remain silent and his demand for an attorney and instead continued interrogating him; (2) he was denied due process by the introduction of his involuntary confession into evidence; (3) he was denied due process by the exclusion from his trial of evidence of coercion in the interrogation process; and (4) the California statute defining the special circumstance of lying in wait is unconstitutionally vague and overbroad. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

On November 25, 1997, an information was filed in the Shasta County Superior Court charging petitioner with murder, in violation of California Penal Code § 187(a) (count I) and possession of a firearm by a felon, in violation of California Penal Code § 12021(a)(1) (count II). (Clerk's Transcript on Appeal (CT) at 254-55.) It was also alleged that: (1) petitioner had previously served two prior prison terms, within the meaning of California Penal Code § 667.5(b); (2) petitioner personally used a firearm during the commission of the murder, within the meaning of California Penal Code §§ 12022.5(a) and 1203.06(a)(1); (3) petitioner was armed with a firearm, within the meaning of California Penal Code § 12022(a)(1); (4) petitioner committed the murder while on parole, within the meaning of California Penal Code § 1203.085(b); and (5) petitioner committed the murder while lying in wait, within the meaning of California Penal Code §

190.2(a)(15). (Id. at 256-257.) On December 1, 1997, petitioner was arraigned and on January 5, 1998, he pled not guilty and denied all of the allegations against him. (Id. at 258, 352.)

On March 26, 1998, petitioner filed a motion to dismiss the information based, in part, on the ground that his confession to police was involuntary. (Id. at 371-402.) The trial judge denied that motion on April 17, 1998. (Id. at 484.) On May 8, 1998, petitioner filed a motion in limine seeking to exclude from evidence his statements to police and a motion to suppress evidence obtained as a result of the search and seizure of his car. (Id. at 519, 611.) After a hearing at which the parties presented evidence, both motions were denied in a written opinion. (Id. at 663-65, 692-702.)

Jury trial commenced on July 28, 1998. (Id. at 848.) On August 13, 1998, the jury found petitioner guilty on both counts and found true all of the special allegations against him. (Id. at 906-14, 1161-67.) Subsequently, petitioner was sentenced to life without the possibility of parole on Count I, three years in prison on Count II, and a consecutive ten-year term for the firearm use allegation. (Id. at 1197-1200; Supplemental Clerk's Transcript on Appeal (SCT) at 6-9.)

On September 16, 1998 petitioner filed his Notice of Appeal. (CT at 1201.) On May 11, 1999, petitioner filed his opening brief on appeal. (Answer, Ex. A.) The appeal was denied by the California Court of Appeal for the Third Appellate District, by order dated March 3, 2000. (Answer, Ex. B.) On April 10, 2000, petitioner filed a petition for review in the California Supreme Court. (Answer, Ex. C.) That petition was summarily denied by order dated June 21, 2000. (Answer, Ex. D.) On November 9, 2000, petitioner filed a petition for writ of habeas corpus in this court.[1]

FACTUAL BACKGROUND[2]

Patricia Kuykendall lived in Redding with Robyn Higgins and Robyn's boyfriend, Abe Santos. On July 9, 1997, Kuykendall discovered her car had been stolen. Around 10 a.m., defendant visited Higgins and found out about Kuykendall's car. Defendant told Kuykendall that Robert Clark had a habit of borrowing cars, duplicating the keys, then stealing the cars later.

Defendant left Kuykendall's house to get Clark and both returned to Kuykendall's home a few minutes later. Once there, Clark was confronted and accused of taking Kuykendall's car. Kuykendall yelled at Clark about her missing car. Defendant accused Clark of stealing Kuykendall's car. Although Clark denied any involvement in the theft of the car, he appeared edgy and nervous.

Kuykendall left the room to call the police around 11 a.m. As she did so, Clark, Santos, and defendant started toward the door. Clark left, and about 10

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1. See Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978) (judicial notice may be taken of court records), aff'd, 645 F.2d 699 (9th Cir. 1981.)

2. The following summary is drawn from the March 2, 2000 opinion of the California Court of Appeal for the Third Appellate District (hereinafter Opinion), at pgs. 2-7, lodged on Feb. 5, 2001, as Exhibit B to respondent's Answer. These facts are fairly supported by the record.

minutes later defendant and Santos left, stating they were going to follow Clark.

Around 12:30 or 1 p.m., an employee at the Carl's Jr. drive-through window waited on three people in a white Mustang. She gave them four hamburgers. She remembered them because they refused to look at her or talk to her. She identified defendant as the driver, and described what he had been wearing. She could only see the legs and feet of the back seat passenger.

At around 1:05 P.M. Christine Coffey, who lives on East Stillwater Road, left with her husband for an appointment. As they left she noticed a white Ford Mustang with black trim and tinted windows. Willis Neely was driving on East Stillwater Road around the same time and also saw the white Mustang. He saw defendant standing behind the car. He saw two other men standing by the car who appeared to be Hispanic, but was unable to identify either of them because they kept their heads down. Neely drove back down East Stillwater about 20 minutes later and saw the car and the same three individuals. On both occasions, Neely made eye contact with defendant.

Clark's body was discovered by the side of East Stillwater Road about 2:30 p.m. He had been shot in the head four times. A methamphetamine pipe lay between his body and his left arm. A cigarette lighter was in his right hand. Two pieces of a hamburger and a fresh cigarette butt were about 10 feet from the body. In his pocket was a key to Kuykendall's car. There were spent .22 shell casings near Clark's feet.

Officers investigating the scene found spinout tire track impressions about four feet from the body. The tire tracks were distinctive because the width of one of the tires was about one-half inch less than the other track. The same tires left impressions about 20 feet from the body. Near those tracks were Birkenstock-type sandal footprints.

A search of defendant's car, a white Ford Mustang with black trim and tinted windows, revealed that the tire tracks found near the body were similar to the distinctive tracks made by the tires on defendant's car. The search also turned up two live .22 rim fire casings under the seats similar to the spent casings found near the body.

Defendant was first questioned on July 11, 1997. Defendant maintained he had not seen Clark after Clark left Kuykendall's house. He gave officers the clothing and shoes he had been wearing on June 9 – a pair of black shorts, a grayish tank top, and a pair of sandals. The clothing was eventually analyzed, and three small blood stains and a blood smear were found on the shorts. The stains found on the shorts were consistent with Clark's DNA and inconsistent with either defendant's or Santos's DNA.

Defendant was taken into custody for parole violation on July 12, 1997, at approximately 8 p.m. After reading him his rights, officers questioned him again about Clark's killing. At first, defendant denied any involvement in Clark's murder. After being shown portions of a videotaped interview in which Abe Santos confessed to watching defendant shoot Clark, defendant confessed. He admitted he initially planned to kill Clark by himself, then decided to ask Santos to help. He and Santos picked up Clark as a convenience store and drove toward a wooded area. En route, they smoked methamphetamine using Clark's pipe.

They pulled over to the side of the road, and the three of them got out of the car and talked near the rear of the car. When defendant approached Clark, Clark "didn't have a care in the world. Just, still gettin' high." Clark said "no matter how hard I try, to be friends with people, or to make people friends, they're still not gonna like me." Then defendant shot Clark while Clark was kneeling down.[3]

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[3] Defendant gave the following rather incoherent statement regarding motive: "They were always talkin' about how [Sigh] he deserved to be dead for all the stuff wrong he's done to people, an' how can a person think up such evil schemes and plans to people, stuff and get away with it. I just thought back about everything that's happened to me, why would it happen to me, you know, um, my wife, my kids, an' it . . . How I could still be nice to people and try to help people out an' now I'm in a messed up situation . . . . an' I just said to myself, fuck, I'm tired of helpin' people, I'm always getting' burnt for it, or hurt, or somethin' comes up an' you know, the same people don't just, there's no respect . . . . I just know it was tough but it wasn't abnormal. Um, outside of the normal imagination, he was doin' it and just scared the shit outta me. So, I said, man he's gonna, he gonna get me killed, man. He's gonna get me killed. By tryin' to disguise himself, as me, usin' my clothes I guess, while I was asleep an' stuff. An' I don't know, man. Blame on the black man. Was always his thing, you know. Um, an' I just got scared for myself, my family, ... So I asked Abe, man . . . if he wanted to do him. An' Abe said, 'Yeah.' Then we left . . . to go look for him. I'm not

Defendant at first denied knowing what happened to the gun, but finally admitted Santos threw it into Shasta Lake. The gun was later retrieved from the lake near where defendant indicated Santos threw it. It was a .22 caliber semiautomatic Baretta pistol. Firing tests determined the retrieved weapon had fired the spent cartridge casings found near the body.

Three witnesses reported seeing defendant with a gun prior to the murder. In a July 11 interview, Robyn Higgins stated she had seen defendant at a motel on July 4, with a small black .22 or. 25 caliber gun with a pop-out barrel. The gun retrieved from Shasta Lake also had a pop-out barrel. In a July 12 interview, she stated defendant had the gun at Kuykendall's apartment the morning of the murder when they confronted Clark about Kuykendall's missing car. She said she saw defendant make the "sliding back" action of a semiautomatic pistol. Defendant later admitted taking the gun out "to look cool," but did not think anyone had seen it. The gun was dark and had a flip up barrel.

Sometime prior to Clark's death, Chris Ward, a friend of both Clark's and defendant's saw defendant and Santos exchange a black gun. Jacqueline Kelley saw defendant with a gun after she went with him to purchase ammunition. The gun looked similar to the one retrieved from Shasta Lake.

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a bad person, man. That's hard to say, an' I just – I apologize to his family, man. I do. but I shot him."

On July 14, 1997, Deputy Paul Moen was holding three inmates in the medical holding cell at the Shasta County jail – defendant, John Zelaya, and Daniel Bartow. Moen heard defendant ask Zelaya and Bartow where they were housed. Then defendant said, "do you know a young looking guy in there, real quiet. He's in here for murder. Tell him his crime partner said we could have gotten away with that shit if he would have kept his mouth shut."

Defendant told Zelaya he had been framed, and told him to tell Santos not to testify. Defendant also told Zelaya not to testify. Some people Zelaya did not know also told him not to testify.

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state court. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085.

However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir. 1980)). See also Lisenba v. California, 314 U.S. 219, 236 (1941); Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). In order to raise such a claim in a federal habeas corpus petition, the "error alleged must have resulted in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). See also Henry, 197 F.3d at 1031; Crisafi v. Oliver, 396 F.2d 293, 294-95 (9th Cir. 1968). Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

Because this action was filed after April 26, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997). Section 2254(d) as amended by the AEDPA, set forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F. 3d 1223, 1229 (9th Cir. 2001).

II. Fifth Amendment Claim

Petitioner's first claim is that his Fifth Amendment right to remain silent was violated by the introduction into evidence of his confession to police. He argues that the interrogating detective improperly continued to question him after he had indicated a desire to remain silent and asked for an attorney. He contends that his continued conversation with police after he invoked his "Miranda" rights did not constitute a waiver of those rights but was "only a sham procedure in which the defendant was told what words to repeat by the interrogating officers." (Points and Authorities in Support of Pet. (hereinafter P&A) at 14.) Petitioner argues that both his confession and the murder weapon, as the "tainted fruit" of the improper questioning, should have been excluded from evidence. Respondent, on the other hand, argues that the state courts' rejection of these arguments were a reasonable application of the decisions in Miranda v. Arizona, 384 U.S. 436 (1966) and Oregon v. Bradshaw, 462 U.S. 1039 (1983).

A. Facts/State Court Rulings

As described above, petitioner filed a pretrial motion in limine to exclude from evidence his statements to police. (CT at 519.) Therein, petitioner argued that the failure of the police to respect his invocations of his right to remain silent and right to counsel violated the Fifth Amendment and the dictates of Miranda v. Arizona. (Id. at 527.) He also argued that his confession was involuntary under the due Process Clause of the Fourteenth Amendment. (Id. at 536.) The trial court held a hearing on the motion, at which both the prosecution and the defense presented evidence. (Id. at 663-65, 695-702, RT at 217-32.) The motion was denied in a written order dated June 17, 1998. (CT at 695-702.)[4]

On direct appeal, petitioner challenged the trial court's June 17, 1998 ruling. In rejecting petitioner's arguments, the California Court of Appeal explained its reasoning, the trial court's ruling, and the facts surrounding this claim as follows:

> On appeal defendant challenges the trial court's ruling with respect to two of his statements. The

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[4] The trial court reviewed audiotapes of the confession prior to rendering a ruling on petitioner's argument that it was involuntary and should have been suppressed. (See RT at 18; CT at 695.) It is not clear whether the state appellate court was provided with the audiotapes or reviewed them in connection with its opinion. The audiotapes have not been lodged in this action. However, a transcript of the relevant portions of the police interview have been provided to this court. (See CT at 547-610; Clerk's Augmented Transcript on Appeal (CTA) at 1-18.) This court has reviewed the transcript and has determined that the audiotapes are not necessary to a resolution of the instant petition.

first is defendant's statement, "I don't even wanna talk about this no more . . . . plead the Fifth." The second ruling challenged by defendant regards his statement, "I'd like to have an attorney present." We consider each statement in context.

The first statement came as Detective Tom O'Connor was accusing defendant of pretending to cry and have sympathy for Clark:

[O'Connor:] "You act like you're cryin' like a baby, an, you can't cry for someone that was a no good . . . an' you killed him for a good reason.

[Defendant:] No way. I – You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.

[O'Connor:] "Right now, you show your remorse.

[Defendant:] "[Voice raised] I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No way I would do it.

[O'Connor:] "Were you high that day?

[Defendant:] "No, sir. I – probably was later on. Yes.

[O'Connor:] "Did you have any dope with you that . . . that day?

(Defendant:] "No, sir.

[O'Connor:] "No, dope at all? What do you smoke with?

[Defendant:] "I smoke with my . . . my fingers.

[O'Connor:]: "When you smoke your dope what do you do with that? How do you smoke that?

[Defendant:] "You smoke it with pipes and stuff like that.
[O'Connor:] "Okay. what kind of pipes?

[Defendant:] "Lines.

[O'Connor:] "What kind of pipes?

[Defendant:] "N'ah . . . I would – I –

[O'Connor:] "Well, what kind of pipes?

[Defendant:] "Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . .

[O'Connor:] "Well, you already are. I wanna know what kinda pipes you have?

[Defendant:] "I plead the fifth.

[O'Connor:] "Plead the fifth. What's that?

[Defendant:] "No, you guys are wrong. You guys are wrong. You guys have – I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right. [Door opens/Closes]

[O'Connor:] "We're not makin' anything up.

[Defendant:] "Sir, sure you are.

[O'Connor:] "What are we makin' up?

[Defendant:] "You're tellin' me that I didn't have tears in my eyes.

[O'Connor:] "Yeah.

[Defendant:] "You're tellin' me, okay, that, uh, uh, Abe said I kilt [sic) him. That's a lie."

The trial court concluded: "Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in the isolation [sic], be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview. The interrogating officer did not continue or reinitiate the interview by posing the question: 'Plead the fifth. what's that?' The questions can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed."

Defendant maintains his statement, "I plead the fifth" was an invocation of his right to remain silent, and the trial court's characterization of the officer's follow-up question as simply clarification was disingenuous.

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Here, the interrogating officer testified he believed that in saying, "I plead the fifth" defendant was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation.

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The law permits the police to "clarify" whether or not a suspect comprehends or waives his Miranda rights where the invocation of rights is ambiguous. (People v. Johnson (1993) 6 Cal. 4th 1, 27; People v. Carey (1986) 183 Cal. App. 3d 99, 103.) In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.

In order to assert the privilege against self incrimination, defendant's attitude must have been such as to show a present lack of willingness to discuss the case with the police. (People v. Dreas (1984) 153 Cal. App. 3d 623, 630) By continuing to talk to the officers, defendant demonstrated a willingness to continue to discuss the case.

The second statement which defendant claims was an invocation of his Miranda rights occurred after he viewed the videotape of Santos's confession implicating him in the murder. After defendant stated, "I'd like to have an attorney present" the following discussion ensued:

[BISHOP:] "Okey [sic]

[CLEMENS:] "OK fine.

[DEFENDANT:] "Sorry, man.

[bishop:] "No, don't apologize

[O'CONNOR:] "Okay, 7-12-97, about 22:45, ten forty-five, uh, p.m. on Saturday. This is it. [Tape goes off/on]

[DEFENDANT:] "Lied . . .

[MCDANNOLD:] "Yeah, yeah . . .

[DEFENDANT:] "Abe did it.

[MCDANNOLD:] "Because we don't what the fuck happened. (sic] 'Cause you didn't tell us.

[DEFENDANT:] “Abe, too?

[MCDANNOLD:] “Probably both of ya. We don’t . . . y-you know, you’re askin’ us questions, that we really can’t answer. because we don’t know the answers to ‘em. So far, Romey, you know as well as I do, these guys have not lied to you, not one bit. They’ve told ya the truth, right from the get-go. Now, you’re askin’ questions that we can’t answer. We’re not judges, and we’re not jurors. We cannot answer that. an’ there’s a couple of reasons that we can’t answer that. Murder, damn sure, his life. But there’s a bunch of degrees of murder.

[DEFENDANT:] “Right.

[MCDANNOLD:] “An’ we don’t know your side of the story. And now, we can’t talk to you.

[DEFENDANT:] “Oh, man, I want to talk to you. I need, I need to talk to you Harry [Bishop].

[MCDANNOLD:] “Listen, we can’t . . .

[DEFENDANT:] “I do man.

[MCDANNOLD:] . . . talk to you because you said you wanted an attorney. We can’t talk to you.

[DEFENDANT:] “Well, I can talk. Yeah, I mean, can’t I

[MCDANNOLD:] “What do you have to . . .

[BISHOP:] “Do you want to talk [to] us?

[DEFENDANT:] "I want to talk to you man why I just [Sigh]

[CLEMENS:] "What'd ya wanna do?

[DEFENDANT:] "I'm scared man. I'm scared.

[MCDANNOLD:] "You should be. You're lookin, right down the barrel of the rest of your life. An' you should be scared. That's what it's all about Romey. But we're tryin' to give you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you.

[CLEMENS:] "He said, he wants to talk to Harry. So can Harry and [Inaudible . . .] talk? . . .

[MCDANNOLD:] "No. Not until he says, I want to talk to him without an attorney. The law says we can't talk to you. Until you say, 'Okay, I was just kiddin, I don't want an attorney.' That's the only way it can happen, Romey. You're the one that said, that you wanted an attorney. An' the law tells us we can't talk to you from that point on. We cannot ask you any questions. We're gonna play by the rules.

DEFENDANT:] "Okay, I – I was just jokin'. I don't wanna talk – Or I want to talk to Harry, the bishop. You know the thing about the attorney, is . . . is wrong of whatever, I don't need an attorney. Is that fair to say so guys [sic] don't get busted outta your jobs.

[MCDANNOLD:] "Okay. Let me ask you . . . i-is the tape runnin'?

[O'CONNOR:] "Yes.

[MCDANNOLD:] "Turn the tape on and say into the tape, that you've changed you're [sic] mind.

[DEFENDANT:] "I've changed my mind [sic]. It's . . . it's . . .

[MCDANNOLD:] "Say it into the tape, you don't want an attorney.

[DEFENDANT:] "I don't want an attorney. I've changed my mind.

[MCDANNOLD:] "Okay, have . . . have you been promised anything?

[DEFENDANT:] No, I'd just like to get a cigarette.

[MCDANNOLD:] Okay.

[DEFENDANT:] "Can I get a cigarette though?

[MCDANNOLD:] "Wait a minute, okay? We're gonna clear this thing up, I'm . . . You want – You're tellin, us you want to do somethin'. An' I'm tryin' to make it legal for you to do it. Okay?

[DEFENDANT:] "Okay.

[MCDANNOLD:] "Has anybody in this room . . .

[DEFENDANT:] "No one's promised me . . . paid me . . . uh

[MCDANNOLD:] "Listen . . . listen, listen to me, okay? Let me do this and do it right okay?

[DEFENDANT:] "All right, I apologize.

[MCDANNOLD:] "Okay. Has anybody in this room promised you anything?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] Has anybody in this room threatened you for anything at all?

[(DEFENDANT:] "No, sir.

[MCDANNOLD:] "Do you feel intimidated by anybody in this room?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Do you feel that – Has anybody in this room, told you that if you didn't talk with us or you did talks to us, that somethin' good was gonna happen?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Okay, so you've made the decision, that you want to talk to us and you do not want an attorney, is that correct?

[DEFENDANT:] "(Pause] Yes, sir.

[MCDANNOLD:] "That's absolutely correct, now you kinda hesitated a little bit . . .

[DEFENDANT:] "Well . . .

[MCDANNOLD:] "You don't want an attorney . . .

[DEFENDANT:] "Yes, sir.

[MCDANNOLD:] ". . . right here in this room . . .

[DEFENDANT:] "Yes, sir.

[MCDANNOLD:] ". . . right now, is that correct?

[DEFENDANT:] "Yes, sir."

Defendant contends it is "apparent from the transcript" that during the time the tape was turned off he was asking what would happen to him as a result of the charges, and that such a question did not waive his right to remain silent, nor did it permit re-initiation of the interrogation.

When an accused invokes the right to counsel after a Miranda advisement, the police must immediately cease interrogation, which can resume in the absence of an attorney only if (1) the accused initiates the conversation, and (2) the circumstances indicate that the accused has made a knowing and intelligent waiver of the right to counsel. (Oregon v. Bradshaw (1983) 462 U.S. 1039 [77 L.Ed.2d 405, 103 S.Ct. 2830]; Edwards v. Arizona (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880].)" (People v. Sims (1993) 5 Cal.4th 405, 48 (conc. & diss. opn. of Justice Kennard).) However, these two issues are separate, and cannot be melded together. Oregon v. Bradshaw, supra, at p. 1045.)

In Oregon v. Bradshaw, supra, the defendant invoked his right to counsel, and questioning ceased. (462 U.S. at p. 1042 [77 L.Ed.2d at p. 410).) Later, the defendant inquired, ",Well, what is going to happen to me now?'" (Id. at p. 1042 [77 L.Ed.2d at p. 4101.) The officer responded that the defendant did not have to talk since he had requested an attorney, and that if he talked it had to be of his own free will. (Ibid.) The officer suggested the defendant take a polygraph test. The defendant took the test, did not pass it, and subsequently admitted the crime. (Ibid.)

In holding the defendant's confession admissible, the court said the initiation of a conversation by a defendant does not itself amount to a waiver of a previously invoked right to counsel but that the accused himself could initiate further communication, exchanges, or conversations with the police. (Oregon v. Bradshaw, supra, 462 U.S. at p. 1044.) If such a conversation takes place after the accused has expressed a desire to deal with the police only through counsel, the burden remains upon the prosecution to show the defendant waived his right to have counsel present during the interrogation. (Ibid.)

"There can be no doubt in this case that in asking, 'Well, what is going to happen to me now?', respondent initiated further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in Edwards. [¶] Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." (Oregon v. Bradshaw, supra, 462 U.S. at pp. 1045-1046.)

Here, if we accept defendant's contention he asked what was going to happen to him next during the brief period in which the tape was turned off, we find no difference between such a question and the query in Oregon v. Bradshaw, supra. In both instances, the accused initiated a communication with the interrogators indicating a willingness to discuss the criminal investigation. Moreover, the first recorded words out of defendant's mouth were, "[l]ied" then "Abe did it."[5] Certainly, these statements evinced a willingness and desire to discuss the investigation. (Oregon v. Bradshaw, supra, 462 U.S. at pp. 1045-1046 [77 L.Ed.2d at. . 412].) Therefore, we hold defendant re-initiated the interrogation.

Whether defendant waived his rights after re-initiating the conversation is a separate issue.

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Here, defendant clearly waived his Miranda rights before making any admissions or confessions. The trial court did not err in finding defendant's statements admissible.[6]

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[5] The officer running the tape recorder testified the recorder was only off for a second, and the only person speaking during the pause in the tape was defendant.

[6] The trial court ruled on petitioner's argument that his confession was given in violation of his right to counsel as follows:

> In this instance, from the transcript, the tapes, and the testimony of witnesses McDannold andO'Connor, the court concludes that there was an express invocation, the invocation was honored and the defendant, himself, immediately continued voluntarily to discuss the matter and engaged the officers in conversation. The defendant made it clear that he wanted to speak with the interviewers despite his invocation of the right to counsel and on following pages of the transcript it was explained to him that if he wished to do so, he would have to expressly state on the tape that he did not want an attorney, which he did. There appeared from the audio tape and the

(Opinion at 9-22.)

B. Legal Principles

"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. at 444. To this end, custodial interrogation must be preceded by advice to the potential defendant that he has the right to consult with a lawyer, the right to remain silent and that anything stated can be used in evidence against him. Id. at 473-74. Once Miranda warnings have been given, if a suspect makes an unambiguous statement invoking his constitutional rights, "all questioning must cease." Smith v. Illinois 469 U.S. 91, 98 (1984). See also Miranda, 384 U.S. 473-74; Michigan v. Mosley, 423 U.S. 96, 10 (1975). Any subsequent statements are relevant only to the question whether the accused waived the right he had previously invoked. Smith, 469 U.S. at 98. "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them

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> transcription nothing coercive about the dialog associated with a clear waiver of counsel following the invocation. He was not threatened with harm or promised a benefit. . . Accordingly, and pursuant to the referenced authority, the court concludes that the confession is not inadmissible in light of the invocation because an immediate knowing and intelligent waiver followed based upon an initiation of further communication by the defendant.

(CT at 699.)

together." Id.

Invocation of the right to remain silent must be construed liberally. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Thus, a suspect need not rely on any special combination of words to invoke the right to silence. Quinn v. United States, 349 U.S. 155, 162 (1955). However, "[a]lthough a suspect 'need not speak with the discrimination of an Oxford don,' he must articulate his desire to [invoke his constitutional rights] sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [an invocation of his constitutional rights]." Davis v. United States, 512 U.S. 456, 459 (1994). Accordingly, in order to determine whether a suspect invoked this Fifth Amendment right, "a court should examine the entire context in which the claimant spoke." Bradley, 918 F.2d at 342 (quoting United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972)).[7] Often, "a suspect's statement as to his willingness or unwillingness to answer questions or his silence in response to some questions does not constitute even an ambiguous or equivocal invocation of the right to remain silent." United States v. Ramirez, 79 F.3d 298, 304 (2d Cir. 1996) (defendant's silence in the wake of two questions, while answering others, did not constitute an invocation of his right to remain silent). See also United States v. Mikell, 102 F.3d 470, 476 (11th Cir. 1996) ("we hold that a suspect's refusal to answer certain questions is not tantamount to the invocation, either equivocal or unequivocal, of the constitutional right to remain silent and that questioning may continue until the suspect articulates in some manner that he wishes the questioning to cease"); Bradley, 918 F.2d at 342-43 (suspect's statement that he would not discuss whether he had been involved in the crime under investigation when followed by suspect's denial of involvement and providing of an alibi was all part of an "ongoing stream of speech" and was neither an invocation of the right to remain silent nor the equivalent of silence).

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[7] This inquiry is sometimes made more complex given that a person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others. Mosley, 423 U.S. at 103-04; Bruni v. Lewis, 847 F.2d 561, 564 (9th Cir. 1988); see also United States v. Garcia-Cruz, 978 F.2d 537, 541-42 (9th Cir. 1992) (finding that when considered in context the appellant's statement could reasonably be construed as only a selective revocation of his waiver of the right to remain silent which did not apply to the line of questioning at issue on appeal).

The United States Supreme Court has rejected a per se proscription of any further interrogation once the person questioned has indicated a desire to remain silent, holding instead "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning' was 'scrupulously honored.'" Mosley, 423 U.S. at 104. The Ninth Circuit has determined that where there has been an equivocal assertion of a constitutional right, the attending officer may ask questions to clarify the defendant's wishes, but only so long as he does not continue a general interrogation. United States v. Rodriguez-Gastelum, 569 F.2d 482, 484 (9h Cir. 1978) (en banc); see also Robtoy v. Kincheloe, 871 F.2d 1478, 1482 (9th Cir. 1989) (if a defendant's statement is ambiguous or equivocal, the police may only ask questions to clarify the defendant's desire to exercise his Miranda rights); Bruni, 847 F.2d at 563 ("if a defendant makes an equivocal request for counsel during interrogation, officials must stop further questioning, except to clarify the defendant's desire for counsel").

With respect to an accused's request for counsel, the Supreme Court has established a "bright-line rule" that all questioning must cease once such a request is made. Edwards v. Arizona, 451 U.S. 477, 485 (1981). If the accused invokes his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and then (b) knowingly and intelligently waived the right he had invoked. Id. at 485-86. See also Wyrick v. Fields, 459 U.S. 42, 44 (1982) (per curiam) (before a suspect in custody can be subjected to further interrogation after requesting an attorney there must be a showing that the "suspect himself initiates dialogue with the authorities"). A valid waiver of the right to counsel cannot be established by showing only that the suspect responded to further police initiated custodial interrogation even if he has been advised of his rights. Edwards, 451 U.S. at 484. Waivers of the right to counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of the right. Id. at 482.

Finally, where an involuntary confession is improperly admitted into evidence at trial, a reviewing court must apply a harmless error analysis, assessing the error "in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 308. In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. See Brecht

v. Abrahamson, 507 U.S. 619, 637 (1993); Beatty, 303 F.3d at 994; Henry, 197 F.3d at 1029. The analysis must be conducted with an awareness that "a confession is like no other evidence," and that "a full confession may have a 'profound impact' on the jury." Fulminante, 499 U.S. at 296. See also Henry, 197 F.3d at 1029-30.

C. Analysis

1. Right to Remain Silent

Prior to his police interview, petitioner was advised of his constitutional rights pursuant to Miranda v. Arizona. (CT at 547-48.) He stated that he understood those rights. (Id.) Although petitioner did not make an express waiver of his rights, he proceeded with the interview without comment. (Id.) The state appellate court found that this willingness to continue the interview constituted a valid waiver of petitioner's constitutional rights. (Opinion at 8-9.) This conclusion is reasonable and has not been challenged by petitioner in this habeas proceeding. Later during the interview set forth above, while being questioned regarding the details of his usage, petitioner informed his interrogators that he "[didn't] want to talk about this no more. We can talk about it later," and that he wanted to "plead the fifth" (CT at 562.) When asked by one of the interrogating officers, "[w]hat's that?" petitioner responded that the police were lying and "making things up" and that he had tried to tell them everything he knew. (Id.) Petitioner then engaged in a lengthy back-and-forth exchange with the officers, during which the police offered to allow petitioner to hear the audiotape of Abe Santos' confession. After listening to the audiotape, petitioner confessed to the murder. Petitioner now argues that his statement that he wanted to "plead the fifth" was an invocation of his right to remain silent, following his initial waiver, that was not honored by his interrogators. Therefore, he contends, all of his subsequent statements should have been suppressed. Respondent counters that petitioner's statement was not an assertion of the right to remain silent and that all subsequent statements were properly admissible.

The state trial court held that, although petitioner's statements that he wanted to be taken into custody, that he would prefer to continue the interview at a later time, and that he wanted to "take the fifth" appeared to be an invocation of his right to remain silent, his later actions made it clear that he did not actually intend or desire to terminate the interview. (Id. at 696, 701.) The trial court also concluded that the police officer's question, "Take the fifth. What's that?" could "reasonably be characterized as a request for clarification or confirmation that petitioner wished to assert his right to remain silent, "and nothing more." (Id.) On appeal, the state appellate court concluded that petitioner's remarks were "ambiguous, that the police subsequently asked "a legitimate clarifying question," and that petitioner's continued willingness to discuss the case indicated that he had not invoked his right to silence in the first instance. (Opinion at 13-14.) In short, both state courts concluded that petitioner did not wish to terminate the interview, regardless of his remarks.

This court also concludes that petitioner's statement "I plead the fifth," spoken in the context of a discussion about drug use, was not a clear indication that petitioner wanted to terminate the entire interview. The phrase "take the fifth" usually refers to the refusal to respond to a question on the witness stand, not to the desire to terminate an entire police interrogation. Although the phrase indicates that petitioner did not want to talk about something, it was not clear exactly what it was that he didn't want to talk about, or even whether he seriously desired to cut off questioning. Certainly it would have been reasonable for a police officer in this situation to ask a question designed to test the meaning of petitioner's statement.[8] See Rodriguez-Gastelum, 569 F.2d at484; Robtoy, 871 F.2d at 1482. Therefore, the state courts' conclusion that Detective O'Connor's subsequent remarks were merely intended to clarify petitioner's ambiguous statement is a reasonable interpretation of the facts in light of the evidence. Further, petitioner's subsequent conduct, where he continued to engage in an ongoing stream of conversation with the detectives following the alleged invocation of his right to remain silent, belies an intention to terminate the interview.[9] Under the

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[8] 8. Petitioner argues that the detectives' questions about his drug usage were not directed toward determining his possible criminal liability for drug usage, but were designed to learn whether petitioner was using the type of drug paraphernalia (methamphetamine pipe) that was found near the victim's body. (P&A at 21.) Therefore, petitioner argues, he wished to end the interrogation because he realized that the questioning was focusing on the circumstances of the murder. (Id.) This argument, although plausible, is based on speculation. The opinion of the state appellate court that petitioner may have merely wanted to terminate the discussion about his drug use is not unreasonable.

[9] 9. Regarding a suspect's waiver of the right to remain silent it has been observed:

> Precisely when waiver may be implied depends on

circumstances presented here, the conclusion of the California Court of Appeal that petitioner did not invoke his right to silence is not contrary to, or an unreasonable application of federal law. Accordingly, petitioner is not entitled to relief on this claim.

2. Right to Counsel

The parties agree that petitioner invoked his right to counsel by virtue of his statement, "I'd like to have an attorney present." As reflected in the state court record, after petitioner made this statement the detectives

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> the circumstances. Even so, there are certain types of cases in which courts routinely conclude that a defendant who has professed an understanding of his right to remain silent has waived that right. For example, a defendant will be held to have effected a waiver when, after receiving warnings and asserting (equivocally or unequivocally) a right to remain silent, he spontaneously recommences the dialogue with his interviewers. [citations omitted]. So, too, if a defendant's incriminating statements were made either as part of a "steady stream" of speech, Bradley v. Meachum, 918 F.2d 338, 342 (2d Cir. 1990), or as part of a back-and-forth conversation with the police, Baskin v. Clark, 956 F.2d 142, 146 (7th Cir. 1992), courts regularly have found waivers. A waiver of Miranda rights also may be implied when, after having received Miranda warnings, a criminal defendant responds selectively to questions posed to him. See United States v. Soliz, 129 F.3d 499, 503 (9th Cir. 1997); United States v. Eaton, 890 F.2d 511, 513-14 (1st Cir. 1989) (Breyer, J.); United States v. Chong, 829 F.2d 1572, 1574 (11th Cir. 1987).

Bui v. Dipaolo, 170 F.3d 232, 240 (1st Cir. 1999).

immediately terminated the interview and turned off the tape recorder. However, as soon as the tape recorder was turned off, petitioner asked what was going to happen to him and continued to converse with the officers. Accordingly, the tape recorder was immediately turned back on. Both the state trial and appellate courts concluded that even though petitioner had invoked his right to counsel, he subsequently changed his mind, continued to talk to authorities and then made an express waiver of his right to counsel. The trial court found that "an immediate knowing and intelligent waiver followed [petitioner's invocation of his right to counsel] based upon an initiation of further communication by the defendant." (CT at 699.) Similarly, the California Court of appeal concluded that petitioner's questions to the officers while the tape recorder was turned off evidenced a desire to continue the interview without an attorney present, noting that petitioner subsequently entered into an express waiver of his right to counsel. The state courts' adjudication of this claim is not based on an unreasonable determination of the facts of this case and is consistent with established federal law. Accordingly, it should not be set aside.

It is reasonable to conclude, as the state courts did, that petitioner initiated a conversation with the authorities after he invoked his right to counsel. During the time the tape recorder was turned off, petitioner began a dialogue about his future prospects. When the recorder was turned back on, "the first recorded words out of [petitioner's] mouth were , '[l]ied" then 'Abe did it'" (Opinion at 21.) These comments do not evidence a desire to communicate only about routine matters, such as a drink of water or a telephone call. Rather, petitioner clearly wanted to continue the substance of the ongoing interrogation. Because petitioner, and not the police, reopened a substantive dialogue with the authorities, the "bright-line" rule of Edwards did not prohibit further questioning. See Bradshaw, 462 U.S. at 1045; United States v. Michaud, 268 F.3d 728, 735-38 (9th Cir. 2001).[10]

The next inquiry is:

> whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Edwards, 451 U.S. at 486 n.9. This determination depends "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The state courts found that petitioner "clearly waived his Miranda rights before making any admissions or confessions." (Opinion at 22.) This conclusion is consistent with the state court record. There is no evidence that the police made any threats or promises or offered any inducements to petitioner in order to get him to talk. Petitioner was again advised of his rights and stated that he understood them, and he repeatedly expressed a desire to continue the interrogation without counsel. The record reflects that petitioner had a "full awareness of both the nature of . . . [his] right . . . and the consequences of the decision to abandon it." Paulino v. Castro, 371 F. 3d 1083, 1086 (9th Cir. 2004) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). Under these circumstances, petitioner could be subject to further interrogation after having previously invoked his right to counsel and his confession was both voluntary and obtained following a knowing waiver of his right to counsel.

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[10] The rule established in Edwards was "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Michigan v. Harvey, 494 U.S. 344, 350 (1990). See also United States v. Michaud, 268 F.3d 728, 737 (9th Cir. 2001). There is no evidence here that law enforcement officials attempted to coerce petitioner into waiving his rights or continuing the interrogation in violation of his constitutional rights.

Even if petitioner's statements were taken in violation of Miranda, the murder weapon could not have been excluded on the theory that it was the tainted fruit of the Miranda violation, as petitioner argues. There is no evidence before this court, and petitioner does not argue, that petitioner was coerced into revealing the location of the murder weapon. The transcript of petitioner's interrogation reflects that petitioner voluntarily elected to tell the investigators where the gun was located. (CTA at 9-15; RT at 873-74.) Therefore, there was no basis to suppress the murder weapon. See United States v. Patane, ___ U.S. ___, 124 S. Ct. 2620, 2629 (2004) (nontestimonial evidence obtained as a result of voluntary statements taken in violation of the Miranda rule is not inadmissible as "fruit of the poisonous tree").

Finally, in light of the other evidence of petitioner's guilt, any error in admitting petitioner's confession would appear to be harmless. As observed by the California Court of Appeal,

> the murder weapon was recovered where [petitioner] said he and Santos disposed of it. [Petitioner] was seen with the murder weapon before the killing. [Petitioner] left Kuykendall's house with the intent of finding Clark. Two witnesses saw [petitioner] with Clark and Santos at the crime scene shortly before the murder. Blood stains on [petitioner's] clothes were consistent with the victim's DNA. Footprints and tire marks matching [petitioner's] were found at the scene. Live .22 casings similar to the spent casings found near Clark's body were in [petitioner's] car. An officer heard [petitioner] say he and Santos would have gotten away with murder if Santos had kept quiet. The evidence of [petitioner's]guilt was overwhelming. . .

(Opinion at 41-42.) Under these circumstances, the admission of petitioner's statements to police would not appear to have had a substantial and injurious effect in determining the jury's verdict. Accordingly, for all of these reasons, petitioner is not entitled to relief on this claim.

III. Fourteenth Amendment Claim

In his next claim, petitioner contends that his confession was coerced and involuntary and "should have been excluded from evidence." (P&A at 26.) Petitioner argues that the interrogating officers "withheld basic needs including cigarettes and warm clothing" until he agreed to talk, exploited his mental condition brought on by chronic drug abuse, threatened him with the death penalty and ignored his requests to remain silent. (Id.) Petitioner notes that he asked for a jacket and cigarettes several times during the interrogation but that they were not provided until he started to cooperate with his interrogators. He states, "the granting of the favors was conditioned on Petitioner's cooperation; once he confessed or agreed to talk, the favors were granted." (Traverse at 10.) Petitioner also claims, without elaboration, that his drug addiction "was a ready source of control and manipulation by the interrogators." (P&A at 27.)

Petitioner also argues that he was psychologically coerced by a promise of leniency implied by the following statement by Lieutenant MacDannold:

> there's a bunch of degrees of murder . . . an' we don't know your side of the story . . . You're lookin' right down the barrel of the rest of your life. An' you should be scared . . . But we're trying to give you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you.

(Id. at 28.) He argues that the "clear implication" of this statement was an illusory promise that "the officers had the power to charge a lower degree of homicide, if only Petitioner would give a complete statement." (Id.) Finally, petitioner claims that the officers continued to question him in violation of the dictates of Miranda so that petitioner "could be induced to talk by an offer to tell him what would happen to him in the future, and that the results of such continued interrogation could be admissible in court despite its illegality." (Id. at 29.)

A. Facts/State Court Opinion

The trial court rejected petitioner's argument in this regard after a thorough review of the relevant record. The court first concluded that the physical environment in the two interview rooms at the Shasta County Sheriff's office where the interrogation took place, was neither coercive nor oppressive. (CT at 696.) With respect to petitioner's physical needs during the interview, the court stated as follows:

> The interrogation was not overly lengthy. The defendant was not deprived of the opportunity to use the restroom. During the course of the latter portions of the interrogation in which he indicated a willingness to discuss the incident, he was provided cigarettes, for which he had made earlier requests. The questioning was, at times, vigorous, but it was not abusive. The court is of the impression that the defendant was "holding his own" in maintaining non-involvement until after he witnessed the tape of a co-participant who implicated him entirely. It was that factor, apparently, which led to the confession in issue.
>
> It is indeed the case that the defendant made requests for food which were not honored and that he remarked that he would like to continue the interview at a later time because he was tired. He also stated that he was cold. There is no evidence to reveal, however, that there was anything about the air temperature in the Sheriff's Office at that time that would lead to a coercive environment.

> Far more likely is the prospect that the defendant was more than a little uncomfortable given the circumstances of his later professed involvement as the shooter. Since the interrogation lasted no more than 3½ hours, it cannot be said that the rejection of the request for food was unreasonable or coercive. Generally speaking, and while the officers from time to time challenged the defendant's veracity, they treated him politely, not harshly. He requested that Detective Harry Bishop, whom he knew from earlier contacts (according to testimony given at these hearings, he was an informant for Bishop) be present. The request was honored. From the totality of the circumstances, the court concludes that the defendant wished to speak with the officers and voluntarily did so.

(Id. at 696-97.)

The state appellate court also rejected petitioner's arguments following a lengthy analysis of the facts and relevant state and federal law. With respect to petitioner's claim that his confession was coerced because he was not allowed to smoke until he confessed, the appellate court stated as follows:

> The interrogation lasted approximately two and one-half hours before the officers went to purchase cigarettes for defendant. During that time defendant asked for a cigarette seven times. He was told either he had to wait, or the officers did not have any cigarettes. Finally, near the end of the interview, one of the officers went to buy some cigarettes for defendant.

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> Defendant cites no authority for the proposition that the denial of cigarettes constitutes physical coercion, and we are aware of none. We do not find that refusing to let the accused smoke a cigarette during two and one-half hours of questioning was so coercive as to rob him of his free will.

(Opinion at 23-24.)

With respect to petitioner's claim that his confession was coerced because he was not allowed warm clothing until he confessed, the state appellate court stated as follows:

> Approximately 25 minutes before defendant requested an attorney, he was taken to a conference room to watch portions of Santos's videotaped confession. Immediately upon entering the conference room, defendant complained of being cold. When he complained again a short time later, he was told they would be finished there soon. He was in the conference room less than 45 minutes. It was the middle of July. This was a fairly short exposure to the temperature in the conference room. Under the totality of the circumstances, we do not see that requiring defendant to remain in the air-conditioned room for this period of time amounted to physical coercion.

(Id. at 24-25.)

With regard to petitioner's argument that the police improperly manipulated his mental condition as a methamphetamine abuser, the appellate court stated:

> this argument lacks any support in the record. There is absolutely no evidence that defendant was experiencing withdrawals or other symptoms from not having had any drugs. There is no evidence the officers used his addition to extract a confession from him.

(Id. at 25.)

With respect to petitioner's argument that he was coerced by promises of leniency, the state appellate court stated:

> Here, there was no promise of leniency, express or implied. There was no implication that defendant would be charged with a lesser crime or receive a lesser sentence if he confessed. Defendant was never told the police were trying to help him. Defendant was merely told the officers could not answer his questions because they had not heard his side of the story, and that since he requested an attorney, they could not talk to him. Defendant later admitted he had not been promised anything.

(Id. at 26.)

Finally, in rejecting petitioner's argument that his confession was coerced because the police questioned him in violation of Miranda, the state appellate court stated, "we have found defendant was not questioned outside Miranda thus, this argument fails. (Id.)

B. Legal Standards

The Fourteenth Amendment to the United States Constitution demands that confessions be made voluntarily. See Lego v. Twomey, 404 U.S. 477, 483-85 (1972). Involuntary confessions may not be used to convict criminal defendants because they are inherently untrustworthy and because society shares "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21 (1959). A confession is voluntary only if it is "'the product of a rational intellect and a free will.'" Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir. 1989 (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963)). See also Blackburn v. Alabama, 361 U.S. 199, 208 (1960). "The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (en banc) (quoting Culombe v. Connecticut, 367 U.S. 568 602 (1961)). See also Pollard v Galaza, 290 F.3d 1030, 1033 (9th Cir.) ("Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will."), cert. denied, 537 U.S. 981 (2002); Henry v. Kernan, 197 F.3d 1021, 1027 (9th Cir. 1999).

"There is no 'talismanic definition of 'voluntariness'' that is 'mechanically applicable.'" Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir.) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973)), cert. denied, ___ U.S. ___, 124 S. Ct. 446 (2003). Rather, voluntariness is to be determined in light of the totality of the circumstances. See Miller v. Fenton, 474 U.S. 104, 112 (1985); Haynes v. Washington, 373 U.S. 503, 513 (1963); Beatty v. Stewart, 303 F.3d 975, 992 (9th Cir. 2002), cert. denied, 538 U.S. 1053 (2003); Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990). This includes consideration of both the characteristics of the petitioner and the details of the interrogation. Schneckloth, 412 U.S. at 226 (The court must examine "the factual circumstances surrounding the confession, assess [] the psychological impact on the accused, and evaluate[] the legal significance of how the accused reacted.") See also Withrow v. Williams, 507 U.S. 680, 693 (1993); Clark, 331 F.3d at 1072; Henry, 197 F.3d at 1026 ("[v]oluntariness depends on such factors as the surrounding circumstances and the combined effect of the entire course of the officers' conduct upon the defendant"). Relevant circumstances that should be considered include the following factors: (1) the youth of the accused; (2) his intelligence; (3) the lack of any advice to the accused of his constitutional rights; (4) the length of the detention; the prolonged nature of the questioning; and (5) the use of any punishment such as the deprivation of food or sleep. Schneckloth, 412 U.S. at 226; United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003). In the end, the court must determine under the totality of the circumstances whether "the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." Beatty, 303 F.3d at 992 (quoting United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)). See also Hutto v. Ross, 429 U.S. 28, 30 (1976); Haynes v. Washington, 373 U.S. 503, 513-14 (1963).

Officials cannot extract a confession "by any sort of threats or violence, nor . . . by any direct or implied promises, however slight, nor by the exertion of any improper influence." Hutto, 429 U.S. at 30 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).[11] Neither physical intimidation nor psychological pressure is permissible. Haswood, 350 F.3d at 1027 ("A confession is involuntary if coerced either by physical intimidation or psychological pressure."); United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) ("subtle psychological coercion suffices . . . at times more effectively 'to overbear a rational intellect and a free will'"). False promises or threats may also render a confession invalid. Miranda, 384 U.S. at 476 ("any evidence that the accused was threatened, tricked, or cajoled into a waiver (of Fifth Amendment right to remain silent) will, of course, show that the defendant did not voluntarily waive his privilege"); Henry, 197 F.3d at 1024 (confession was coerced where interrogating officers falsely told accused that what he said could not be used against him). But cf. Pollard v. Galaza, 290 F.3d 1030, 1034 (9th Cir.), cert. denied 537 U.S. 981 (2002) ("misrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct").

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[11] This broadly-stated rule has not been applied to invalidate, per se, all statements made by a suspect in response to a promise made by law enforcement personnel. Rather, the promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances. See Hutto v. Ross, 429 U.S. 28, 30 (1976).

C. Analysis

After a review of the record, this court concludes that the decision of the California courts that petitioner's confession was neither coerced nor involuntary is not contrary to or an unreasonable application of federal law and should not be set aside. The California Court of Appeal properly identified the relevant threshold question and applied the correct controlling authority. The factual findings by the state courts have not been rebutted by clear and convincing evidence and are, therefore, presumed to be correct. See 28 U.S.C. § 2254(e)(1). They are also consistent with this court's review of the transcribed interview. The state courts' conclusion that petitioner's confession was not coerced by virtue of the fact that he was unable to smoke a cigarette during two and one-half hours of questioning or to wear a jacket during the approximately forty-five minutes it took to listen to Abe Santos' confession in an air-conditioned room is not contrary to the facts or to federal law. There is no evidence that "physical or psychological coercion" or "improper inducement" led to petitioner's statements or that petitioner's will was overborne because of the lack of food or clothing during the three hour interview. See Clark, 331 F. 3d at 1072-73 (eight hour interrogation in a small, windowless interrogation room did not render confession involuntary); Cunningham v. City of Wenatchee, 345 F.3d 802, 810-11 (9th Cir. 2003) (eight hour interrogation that continued after suspect proclaimed his innocence and during which police both suggested that cooperation could result in treatment rather than imprisonment and denied suspect's request to call his therapist was not coercive), cert. denied, ___ U.S. ___, 124 S. Ct. 2070 (2004). Petitioner has also failed to show that his status as a methamphetamine abuser was exploited by the police to extract a confession. See United States v. Coleman, 208 F. 3d 786, 791 (9th Cir. 2000) (defendant's heroin withdrawal causing lethargy and discomfort did not render his statements to police involuntary); United States v. Rodriguez-Rodriguez, 364 F. 3d 1142, 1146 (9th Cir. 2004) (same).

Petitioner contends that the California Court of Appeal missed the mark when it interpreted his claim as an argument that the lack of cigarettes and warm clothing during the interrogation rendered his confession involuntary. He now contends that his argument is slightly different: that the police officers used favors, such as cigarettes and warm clothing, as an improper inducement to confess. He states,

> the state court of appeal, however, merely treats these issues as a question of withholding favors, whereas in fact the granting of the favors was conditioned on Petitioner's cooperation; once he confessed or agreed to talk, the favors were granted. It is this aspect which renders the manipulation coercive.

(Traverse at 10.) However, this court does not find that the detectives' provision of cigarettes and a coat at the end, and not at the beginning, of a three hour interview was so manipulative that petitioner's will was overborne.

With respect to the alleged promise of leniency, the undersigned does not agree with petitioner's contention that Lieutenant McDannold's statements implied that the police would reduce the charges brought against petitioner if he would confess. Lieutenant McDannold's statements were ambiguous at best and only a tortured reading could result in a promise of leniency being construed therefrom. Even if the officer's remarks could be so construed, there is no evidence that they undermined petitioner's ability to exercise his free will. See Unite States v. Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988) (an interrogator's promise to recommend leniency does not render a suspect's confession involuntary). Finally, as explained above, petitioner has failed to demonstrate that the police violated the dictates of Miranda, either inadvertently or deliberately, in eliciting his confession. Accordingly, this court rejects petitioner's argument that his confession was obtained in violation of the right to remain silent. For all of the foregoing reasons, petitioner is not entitled to relief on this claim.

IV. Exclusion of Evidence

Petitioner's next claim is that the trial court violated his right to due process when it excluded evidence from the trial of "coercion" in the interrogation process. Petitioner describes the claim as follows:

> This argument reduces to the question of whether Petitioner planned and premeditated the shooting of Clark, or whether he was "lying in wait" to commit the shooting. The evidence excluded from the jury's consideration indicated that the defendant was abnormally concerned about presenting a good impression, and would tend to say whatever the officers wanted in order to curry their favor. He did not want to appear to have

> committed a spontaneous, irrational act, even though, if that were the truth, it would undermine the lying-in-wait allegation and tend to a lesser degree of homicide.

(Traverse at 10-11.) Petitioner contends that evidence of police coercion during his interrogation, such as yelling and badgering, would have supported his defense that he exaggerated the facts of the killing during his interrogation; that, in fact, he did not premeditate the murder or lie in wait. Petitioner states, here, the defense hoped to show that the defendant did not use the degree of planning that would lead to a finding of lying in wait. It could have been shown that the defendant in his confession made out his own planning activities to be more organized than they in fact were." (P&A at 30-31.) He argues that the trial court's ruling excluding evidence of alleged coercion "emasculated the defense" because it deprived him of evidence tending to show that his confession was "skewed to be more self-incriminatory, as a result of police interrogation tactics." (Id. at 34.)[12]

The California Court of Appeal fairly described the background to this claim as follows:

> The jury heard an edited version of the interrogation which included defendant's confession. During trial, defendant's counsel informed the court he intended to question the two

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[12] On direct appeal, petitioner claimed that the combination of three of the trial court's rulings "emasculated [his] defense." (Opinion at 39.) In this petition, only this ruling is challenged.

> officers who interrogated defendant about the psychologically coercive character of the interview in order to show defendant's confession was not credible.
>
> Specifically, defendant wanted to show he made certain representations about his mental state which were not true. He hoped to show the circumstances of the interrogation made him want to accommodate his interrogators and tell them whatever they wanted to hear. He claimed because of his self-image and behavioral background, he hated being perceived as being out of control. He theorized that because of this, he did not want to characterize the killing as a spontaneous, irrational act. The court ruled defendant could question the interrogating officers about any inconsistencies in defendant's statement as such inconsistencies might bear on the truthfulness of his statement, but could not "challenge directly or indirectly the confession in the sense that the Court has to perform that analysis on the 402 hearing in advance of the – in advance of the trial, that's water under the bridge, so that will be disallowed. The trial court later clarified it would not let the defense introduce the interrogating officer's testimony concerning defendant's efforts to terminate the interrogation, to lie down, to have a cigarette, or to have a lawyer present, because those areas were relevant only to the issue of voluntariness and coercion.

(Opinion at 39-40.)

Petitioner notes that the edited interrogation transcript admitted into evidence was only 18 pages out of a total of 167 pages. (P&A at 31.) He states that the defense sought to elicit evidence that was not in the edited version, which consisted of passages where Detective O'Connor "raised his voice" at petitioner or yelled at petitioner for "several sentences in a row." (Id.) The trial court sustained a relevancy objection to this evidence. (RT at 1038.) Later, during a break, the court provided petitioner's counsel an opportunity to explain the relevance of his proposed line of questioning. (Id. at 1042.) Petitioner's counsel explained his reasoning as follows:

> If these are areas the Court just ruled on previously out of the presence, I apologize, but I didn't think that we dealt with these in specific context. I wanted to – I do want to introduce this officer's testimony concerning Mr. Anderson's efforts to terminate the interrogation to try to assume some sort of control over the proceedings. It is his efforts to ask to lie down, to have a cigarette, to stop answering questions, to just stop answering questions entirely, to have a lawyer present.
>
> And the relevance offered for that issue is, again, Mr. Anderson's degenerating mental state during the interview and the effect it has on what he subsequently told the officers.

(Id. at 1042-43.) The trial court responded that the questions the defense wished to ask of the interrogating officers were only relevant to the issue of "voluntariness and the coercion, which are areas that we covered previously." (Id. at 1043.) The trial court made the same ruling with respect to any questions pertaining to "what was said to Mr. Anderson or what Mr. Anderson said to police about penalty – about life in prison, about the death penalty." (Id. at 1046-47.) Petitioner argues that all of this excluded evidence was relevant to his defense that his confession was not credible, but rather was exaggerated for purposes of maintaining a positive self-image.

Citing Crane v. Kentucky, 476 U.S. 683, 688-89 (1986), the California Court of Appeal concluded that the trial court did not err in denying petitioner's request to admit evidence of "coercion." (Opinion at 40-44.) The court noted that the jury did hear evidence fully describing the physical and psychological environment surrounding petitioner's confession, including evidence of petitioner's emotional state, petitioner's requests to lie down, the fact that petitioner had used methamphetamine, and the fact that the officers accused petitioner of lying and "yelled at him." (Opinion at 41.) The state appellate court also noted that: (1) the trial court gave defense counsel the opportunity to call the interrogating officers to the stand to question them about inconsistencies in petitioner's statements to police, but he chose not to do so; and (2) the defense did not seek to offer the entire taped confession but, in fact, sought to have it edited before it went to the jury. (Id.) The appellate court found that there was "overwhelming" evidence linking petitioner to the crime of murder by lying in wait; therefore it was "beyond a reasonable doubt the verdict would have been the same even if the jury had heard evidence of the circumstances surrounding the interrogation." (Id. at

42.)[13]

Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense; this right is "a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also Crane, 476 U.S. at 690 ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") "However, that right is not unlimited." Greene v. Lambert, 288 F.3d 1081, 1090 (9th Cir. 2002). Thus, a state law justification for exclusion of evidence does not abridge a criminal defendant's right to present a defense unless it is "arbitrary or disproportionate" and "infringe[s] upon a weighty interest of the accused." United States v. Scheffer, 523 U.S. 303, 308 (1998). See also Crane, 476 U.S. at 689-91 (discussion of the tension between the discretion of state courts to exclude evidence at trial and the federal constitutional right to "present a complete defense"); Greene, 288 F.3d at 1090. In addition, a state court's evidentiary ruling is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process. Drayden v. White, 232 F. 3d 704, 710 (9th Cir. 2000), cert. denied, 532 U.S. 984 (2001). See also Whelchel v. Washington, 232 F. 3d 1197, 1211 (9th Cir. 2000).

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[13] The evidence at trial demonstrated that "the victim was shot execution-style at close range. He had no defensive wounds. He died holding his cigarette lighter with one hand and appeared to have dropped his methamphetamine pipe with the other. There was no signs of a scuffle, so that he appeared to have simply fallen down where he died. Shortly before the murder, witnesses saw Clark with defendant in a remote area, and there was no testimony Clark appeared to be frightened of defendant. (Opinion at 42-43.) The California Court of Appeal found that this was "overwhelming" evidence of lying in wait. Petitioner states that the evidence was susceptible to the interpretation that petitioner "may have been undecided about what to do until the last moment" or that he shot the victim "on impulse." (Traverse at 11.) However, the state court's interpretation is consistent with the evidence in this case and is certainly not unreasonable.

As noted above, the California Court of Appeal relied upon the Supreme Court's decision in Crane v. Kentucky in rejecting petitioner's argument and finding that the trial court did not err in limiting the cross-examination of the interrogating officers at trial. Crane involved a 16-year-old boy's confession to murder, upon which the prosecution's case was largely based. Defense counsel's theory, advanced during opening statement, was that the boy's confession was full of inconsistencies and that the circumstances surrounding the confession were sufficient to cast doubt upon its credibility. The prosecutor moved in limine to prevent the defense from presenting any testimony about the circumstances under which the confession was obtained. The trial court granted the motion, finding the evidence was relevant only to the issue of voluntariness, which was not before the jury. 476 U.S. at 686-87. The United States Supreme Court reversed, finding a clear distinction between the voluntariness of a confession, which is a legal issue, and the separate question of its reliability, which is a factual question. The Supreme Court held that the defendant was deprived of a meaningful opportunity to put forth a complete defense by being denied the opportunity to introduce testimony about the circumstances surrounding his confession. Id. at 690-91.

Contrary to the case in Crane, here petitioner was not deprived of a meaningful opportunity to present a complete defense. Moreover, in Crane the entire defense was that there was no physical evidence linking the defendant to the crime and that his admission of guilt was not to be believed under the circumstances under which it was given. Here, on the contrary, petitioner counsel presented an alternative defense to the jury that methamphetamine usage rendered him incapable of forming the specific intent necessary for a finding of guilt of first degree murder and that the evidence did not support a finding of premeditated murder or murder by lying in wait. (Id at 1328-68.) Petitioner does not argue that he was prevented from presenting that defense to the jury. Further, as explained in detail by the state appellate court, the jury in petitioner's case heard testimony regarding all of the circumstances surrounding petitioner's interrogation which could have supported a defense that his confession was exaggerated in response to police interrogation tactics and was, therefore, unreliable. (See Opinion at 41.) Defense counsel was also given the opportunity to introduce other evidence that might have supported that defense, such as inconsistencies in petitioner's statements to police. (Id.) He chose not to do so. Unlike the situation confronted by the Supreme Court in Crane, here there was no "wholesale exclusion" of a "body of potentially exculpatory evidence" related to the sole defense theory. Cf. Crane, 476 U.S. at 691. In short, the opinion of the California Court of Appeal that the trial court's evidentiary ruling did not prevent petitioner from presenting a defense is not contrary to or an unreasonable application of Crane. Therefore, habeas corpus relief is unavailable on this claim.

Finally, the opinion of the state appellate court that the trial court's evidentiary ruling did not result in prejudice to petitioner is not contrary to or an unreasonable application of federal law. As noted by the California Court of Appeal, the evidence of petitioner's guilt was overwhelming. Petitioner was able to present a viable defense of incapacity without the evidence sought to be introduced. Under these circumstances, the trial court's ruling excluding evidence of "coercion" during the interrogation process did not have a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). For all of these reasons, petitioner is not entitled to relief on this claim.

V. Constitutionality of Statute

In his final claim, petitioner argues that the California statute defining the special circumstance of "lying in wait" is unconstitutionally vague and overbroad.[14] He contends that the statute is overbroad because it encompasses nearly all intentional killings except a "classic duel" and because the prosecutor is improperly given unfettered discretion with respect to when to charge the special circumstance. (P&A at 34-35; Traverse at12-13.) He also argues that the statute should include the requirement that there be an "actual ambush" and an element of "concealment." (P&A at 36.) Petitioner claims that the statute is unduly vague because the requirement that there be a "substantial period of watching and waiting" is not given a "reasonable definition." (Id. at 37.) Respondent contends that petitioner does not have standing to raise this claim because he did not receive the death penalty. See Houston v. Roe, 177 F. 3d 901, 907 (9th Cir. 1999) (petitioner lacked standing to challenge Penal Code § 190.2(a)(15) because he was not sentenced to death). Petitioner argues that "any penal statute is subject to challenge on the ground that it is vague" and that a death penalty statute which has been used to impose life without parole is "particularly subject to challenge for overbreadth." (P&A at 34, Traverse at 12.)

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[14] In California, special circumstance murder, which carries the penalty of death or life without the possibility of parole, is statutorily defined as murder where the "defendant intentionally killed the victim while lying in wait." Cal. Penal Code § 190.2(a)(15). The statute requires "(1) a concealment of purpose (2) a substantial period of watching and waiting for a favorable or opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." People v. Cole, 33 Cal. 4th 1158, 1205 (2004). The period of "watchful waiting" may occur even while the victim is present. People v. Morales, 48 Cal. 3d 527, 558 (1989).

The California Court of Appeal rejected petitioner's argument on the ground that it had been rejected by the California Supreme Court. Petitioner concedes that California has rejected his challenges to that statute. See Morales, 48 Cal. 3d at 557-58 (1989) (statute provides a meaningful basis for distinguishing capital and noncapital cases); People v. Sims, 5 Cal. 4th 405, 434 (1993) (California's lying-in-wait special circumstance provides a meaningful basis for narrowing the class of murders for which the penalty of death may be imposed); People v. Edwards, 54 Cal.3d 787, 824 (1991) (same). However, the question before this court is whether the state courts' conclusion that California Penal Code § 190.2(a)(15) is not impermissibly vague and overbroad is contrary to or an unreasonable application of federal law.

Assuming arguendo that petitioner has standing to raise this claim, he is still not entitled to relief. The United States Supreme Court has not held that California Penal Code § 190.2(a)(15), or any other statute, is unduly vague or overbroad in its use of the term "lying in wait" to find special circumstance murder. In fact, petitioner acknowledges that "the issue has not received federal court review." (P&A at 36.) Accordingly, the opinion of the California Court of Appeal upholding the constitutionality of this statute is not contrary to or an unreasonable application of clearly established federal law and may not be set aside. 28 U.S.C. § 2254(d)(1).[15]

For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and

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[15] The Ninth Circuit Court of Appeals has rejected the argument that, in California, non-capital first degree murder by means of lying in wait is indistinguishable from capital first degree murder with the special circumstance of lying in wait and therefore encourages arbitrary and discriminatory enforcement. Houston v. Roe, 177 F.3d 901, 907 (9th Cir. 1999). The Ninth Circuit has also held the California Penal Code § 190.2(a)(15) is not unconstitutionally vague. Morales v. Woodford, 336 F.3d 1136, 1150 (9th Cir. 2003).

Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991.)

DATED: September 27, 2004.

/s/ Dale A. Drozd
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

FILED
October 15 2004
Clerk, U.S. District Court
Eastern District of California
By____________________
Deputy Clerk

CLOSED

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEROME ALVIN ANDERSON,

Petitioner,
No. CIV S-00-2404 WBS DAD P

vs.

C. A. TERHUNE,

Respondent.
ORDER

Petitioner, a state prisoner proceeding through counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On September 28, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 28, 2004, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: 10/14/2004 .

/s/ William B. Shubb
UNITED STATES DISTRICT JUDGE

FILED
November 1 2004
Clerk, U.S. District Court
Eastern District of California
By____________________
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEROME ALVIN ANDERSON,

Petitioner, No. CIV S-00-2404 WBS DAD P

vs.

C. A. TERHUNE,

Respondent. ORDER

_______________________________/

Petitioner, a state prisoner proceeding through counsel, has timely file a notice of appeal of this court's October 15, 2004 denial of his application for a writ of habeas corpus.[1] Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

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[1] The document filed by petitioner is entitled "request for Certificate of Appealability." This court will construe petitioner's document as a notice of appeal as well as a request for certificate for appealability. See Tinsley v. Borg, 895 F.2d 520, 523 (1990) ("We treat his timely pro se motion for a certificate of probable cause as a timely notice of appeal. Numerous circuits, including our own, have 'held that a request for a certificate of probable

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate with specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is "'debatable among jurists of reason,'" could be resolved differently by a different curt, or is "'adequate to deserve encouragement to proceed further.'" Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).[2]

Petitioner has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant petition: (1) whether he was denied his constitutional right to remain silent; (2) whether he was denied due process by the introduction of his involuntary confession into evidence; and (3) whether he was denied due process by the exclusion from his trial of evidence of coercion in the interrogation process.

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cause can serve 'double-duty' as notice of appeal.'") (quoting McMillan v. Barksdale, 823 F.2d 981, 983 (6th Cir. 1987) (collecting cases)); Poe v. Gladden, 287 F.2d 249, 251 (9th Cir. 1961).

[2] Except for the requirement that appealable issues be specifically identified, the standard for issuance of a certificate of appealability is the same as the standard that applied to issuance of a certificate of probable cause. Jennings, at 1010.

Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the present action.

DATED: 11/1/2004.

/s/ William B. Shubb
UNITED STATES DISTRICT JUDGE

APPENDIX D

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,
Plaintiff and Respondent,

v.

JEROME ALVIN ANDERSON,
Defendant and Appellant.

C030610

(Super. Ct.
No. 97F5048)

FILED

March 2 2000
Court of Appeal-Third District
Robert Liston, Clerk
By____________,
Deputy

A jury convicted defendant Jerome Anderson of the murder of Robert Clark, and found he committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a) (15))[1] and while armed with and personally using a firearm. (§§ 12022, subd. (a) (1); 12022.5, subd. (a).) The jury also found defendant guilty of possession of a firearm by a felon (§§ 12021, subd. (a) (1); 1203.06, subd. (a) (1).) The court sentenced him to life without

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1. References to a section are to the Penal Code.

the possibility of parole plus 13 years.

Defendant raises the following arguments on appeal: (1) the lying in wait special circumstance is unconstitutionally vague and overbroad; (2) his *Miranda* rights were violated; (3) his confession was involuntary; (4) he was improperly denied discovery; (5) the trial court should have granted his motion for mistrial; (6) the trial court improperly excluded evidence of racist statements by the victim; (7) the trial court's erroneous rulings improperly bolstered the testimony of a jailhouse informant; and (8) the trial court's evidentiary rulings improperly limited his defense.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Patricia Kuykendall lived in Redding with Robyn Higgins and Robyn's boyfriend, Abe Santos. On July 9, 1997, Kuykendall discovered her car had been stolen. Around 10 a.m., defendant visited Higgins and found out about Kuykendall's car. Defendant told Kuykendall that Robert Clark had a habit of borrowing cars, duplicating the keys, then stealing the cars later.

Defendant left Kuykendall's house to get Clark and both returned to Kuykendall's home a few minutes later. Once there, Clark was confronted and accused of taking Kuykendall's car. Kuykendall yelled at Clark about her missing car. Defendant accused Clark of stealing Kuykendall's car. Although Clark denied any involvement in the theft of the car, he appeared edgy and nervous.

Kuykendall left the room to call the police around 11 a.m. As she did so, Clark, Santos, and defendant started toward the door. Clark left, and about 10 minutes later defendant and Santos left, stating they were going to follow Clark.

Around 12:30 or 1 p.m., an employee at the Carl's Jr. drive-through window waited on three people in a white Mustang. She gave them four hamburgers. She remembered them because they refused to look at her or talk to her. She identified defendant as the driver, and described what he had been wearing. She could only see the legs and feet of the back seat passenger.

At around 1:05 p.m. Christine Coffey, who lives on East Stillwater Road, left with her husband for an appointment. As they left she noticed a white Ford Mustang with black trim and tinted windows. Willis Neely was driving on East Stillwater Road around the same time and also saw the white Mustang. He saw defendant standing behind the car. He saw two other men standing by the car who appeared to be Hispanic, but was unable to identify either of them because they kept their heads down. Neely drove back down East Stillwater about 20 minutes later and saw the car and the same three individuals. On both occasions, Neely made eye contact with defendant.

Clark's body was discovered by the side of East Stillwater Road about 2:30 p.m. He had been shot in the head four times. A methamphetamine pipe lay between his body and his left arm. A cigarette lighter was in his right hand. Two pieces of a hamburger and a fresh cigarette butt was about 10 feet from the body. In his pocket was a key to Kuykendall's car. There were spent

.22 shell casings near Clark's feet.

Officers investigating the scene found spinout tire track impressions about four feet from the body. The tire tracks were distinctive because the width of one of the tires was about one-half inch less than the other track. The same tires left impressions about 20 feet from the body. Near those tracks were Birkenstock-type sandal footprints.

A search of defendant's car, a white Ford Mustang with black trim and tinted windows, revealed that the tire tracks found near the body were similar to the distinctive tracks made by the tires on defendant's car. The search also turned up two live .22 rim fire casings under the seats similar to the spent casings found near the body.

Defendant was first questioned on July 11, 1997. Defendant maintained he had not seen Clark after Clark left Kuykendall's house. He gave officers the clothing and shoes he had been wearing on June 9 -- a pair of black shorts, a grayish tank top, and a pair of sandals. The clothing was eventually analyzed, and three small blood stains and a blood smear were found on the shorts. The stains found on the shorts were consistent with Clark's DNA, and inconsistent with either defendant's or Santos's DNA.

Defendant was taken into custody for parole violation on July 12, 1997, at approximately 8 p.m. After reading him his rights, officers questioned him again about Clark's killing. At first, defendant denied any involvement in Clark's murder. After being shown portions of a videotaped interview in which Abe Santos confessed to watching defendant shoot Clark, defendant confessed. He admitted he initially planned to kill Clark by himself, then decided to ask Santos to help. He and Santos picked up Clark at a convenience store and drove toward a wooded area. En route, they smoked methamphetamine using Clark's pipe.

They pulled over to the side of the road, and the three of them got out of the car and talked near the rear of the car. When defendant approached Clark, Clark "didn't have a care in the world. Just, still gettin' high." Clark said "no matter how hard I try, to be friends with people, or to make people friends, they're still not gonna like me." Then defendant shot Clark while Clark was kneeling down.[2]

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[2] Defendant gave the following rather incoherent statement regarding motive: "They were always talkin' about how, [Sigh] he deserved to be dead for all the stuff wrong he's done to people, an' how can a person think up such evil schemes and plans to people, stuff and get away with it. I just thought back about everything that's happened to me, why would it happen to me, you know, um, my wife, my kids, an' it . . . How I could still be nice to people and try to help people out an' now I'm in a messed up situation. . . . An' I just said to myself, fuck, I'm tired of helpin' people, I'm always gettin' burnt for it, or hurt, or somethin' comes up an' you know, the same people don't just, there's no respect. . . . I just know it was tough but it wasn't abnormal. Um, outside of the normal imagination, he was doin' it and just scared the shit outta me. So, I said, man he's gonna, he gonna get me killed, man. He's gonna get me killed. By tryin' to disguise himself, as me, usin' my clothes I guess, while I was asleep an' stuff. An' I don't know, man. Blame on the black man. Was always his thing, you know. Um, an' I just got scared for myself, my family, ... So I asked Abe, man . . . if he wanted to do him. An' Abe said, 'Yeah.' Then we left . . . to go look for him. I'm not a bad person, man. That's hard to say, an' I just -- I apologize to his family, man. I do. But I shot him."

Defendant at first denied knowing what happened to the gun, but finally admitted Santos threw it into Shasta Lake. The gun was later retrieved from the lake near where defendant indicated Santos threw it. It was a .22-caliber semiautomatic Baretta pistol. Firing tests determined the retrieved weapon had fired the spent cartridge casings found near the body.

Three witnesses reported seeing defendant with a gun prior to the murder. In a July 11 interview, Robyn Higgins stated she had seen defendant at a motel on July 4, with a small black .22 or .25 caliber gun with a pop-out barrel. The gun retrieved from Shasta Lake also had a pop-out barrel. In a July 12 interview, she stated defendant had the gun at Kuykendall's apartment the morning of the murder when they confronted Clark about Kuykendall's missing car. She said she saw defendant make the "sliding back" action of a semiautomatic pistol. Defendant later admitted taking the gun out "to look cool," but did not think anyone had seen it. The gun was dark and had a flip up barrel.

Sometime prior to Clark's death, Chris Ward, a friend of both Clark's and defendant's, saw defendant and Santos exchange a black gun.

Jacqueline Kelley saw defendant with a gun after she went with him to purchase ammunition. The gun looked similar to the one retrieved from Shasta Lake.

On July 14, 1997, Deputy Paul Moen was holding three inmates in the medical holding cell at the Shasta County jail--defendant, John Zelaya, and Daniel Bartow. Moen heard defendant ask Zelaya and Bartow where they were housed. Then defendant said, "do you know a young looking guy in there, real quiet. He's in here for murder. Tell him his crime partner said we could have gotten away with that shit if he would have kept his mouth shut."

Defendant told Zelaya he had been framed, and told him to tell Santos not to testify. Defendant also told Zelaya not to testify. Some people Zelaya did not know also told him not to testify.

DISCUSSION

I

Lying in Wait

Defendant argues the lying in wait special circumstance is unconstitutionally vague and overbroad. He cites Justice Mosk's dissent in *People* v. *Morales* (1989) 48 Cal.3d 527, 575, and argues the special circumstance is so broad as to embrace nearly all intentional killings. He argues that a special circumstance which imposes life imprisonment must, like the death penalty, narrow the group of murderers upon whom such penalty may be imposed. The Supreme Court has rejected this challenge to the lying in wait special circumstance. (*People* v. *Morales*, *supra*, at pp. 557-558; *People* v. *Sims* (1993) 5 Cal.4th 405, 434.) These decisions are controlling.

Defendant also claims the definition of lying in wait is "hopelessly vague." The Supreme Court has rejected this challenge as well, stating the lying in wait special circumstance "has specific and clear requirements which sufficiently distinguish a lying-in-wait murder from other first degree murders to justify treating it as a special circumstance." (*People* v. *Edwards* (1991) 54 Cal.3d 787, 824.)

II

Miranda

Defendant argues his confession was improperly admitted because it was taken in violation of his *Miranda* rights.[3] He claims the murder weapon is the "tainted fruit" of the *Miranda* violation and also should have been excluded. We disagree.

Before being interviewed on July 12, defendant was given the *Miranda* warnings. Defendant indicated he understood his rights. Although he did not expressly waive his rights at that time, his subsequent willingness to speak showed a knowing and intelligent waiver of his rights. (*People* v. *Whitson* (1998) 17 Cal.4th 229, 246-250.) Defendant filed a motion in limine to exclude his confession on the grounds that he later made repeated requests to remain silent and have an attorney present which were ignored, his confession was involuntary, and his confession was substantially more prejudicial than probative (Evid. Code, § 352). The trial court denied defendant's motion to suppress his confession.

On appeal defendant challenges the trial court's ruling with respect to two of his statements. The first is defendant's statement, "I don't even wanna talk about this no more. . . . I plead the Fifth." The second ruling challenged by defendant regards his statement, "I'd like to have an attorney present." We consider each statement in context. The first statement came as Detective Tom O'Connor was accusing defendant of pretending to cry and have Sympathy for Clark:

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[3] *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

[O'Connor:] "You act like you're cryin' like a baby, an' you can't cry for someone that was a no good . . . an' you killed him for a good reason.

[Defendant:] "No, way! No, way. I -- You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.

[O'Connor:] "Right now, you show your remorse.

[Defendant:] "[Voiced raised] I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No, way I would do it.

[O'Connor:] "Were you high that day?

[Defendant:] "No, sir. I -- probably was later on. Yes.

[O'Connor:] "Did you have any dope with you that . . . that day?

[Defendant:] "No, sir.

[O'Connor:] "No, dope at all? What do you smoke with?

[Defendant:] "I smoke with my . . . my fingers.

[O'Connor:] "When you smoke your dope what do you do with that? How do you smoke that?

[Defendant:] "You smoke it with pipes and stuff like that.

[O'Connor:] "Okay. What kind of pipes?

[Defendant:] "Lines.

[O'Connor:] "What kind of pipes?

[Defendant:] "N'ah . . . I would -- I --

[O'Connor:] "Well, what kind of pipes?

[Defendant:] "Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . .

[O'Connor:] "Well, you already are. I wanna know what kinda pipes you have?

[Defendant:] "I plead the fifth.

[O'Connor:] "Plead the fifth. What's that?

[Defendant:] "No, you guys are wrong. You guys are wrong. You guys have -- I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right.

It's not right. [Door opens/Closes]

[O'Connor:] "We're not makin' anything up.

[Defendant:] "Sir, sure you are.

[O'Connor:] "What are we makin' up?

[Defendant:] "You're tellin' me that I didn't have tears in my eyes.

[O'Connor:] "Yeah.

[Defendant:] "You're tellin' me, okay, that, uh, uh, Abe said I kilt [sic] him. That's a lie."

The trial court concluded: "Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in the isolation, be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview. The interrogating officer did not continue or reinitiate the interview by posing the question: 'Plead the fifth. What's that?' The questions can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed."

Defendant maintains his statement, "I plead the fifth" was an invocation of his right to remain silent, and the trial court's characterization of the officer's follow-up question as simply clarification was disingenuous.

In *People* v. *Silva* (1988) 45 Cal.3d 604, the defendant waived his rights and was interviewed regarding a murder. Whenever the questioning would focus on the murder, the defendant would become evasive, saying at one point, "'I don't know. I really don't want to talk about that.'" (*Id.* at p. 629.) On appeal, the defendant claimed this statement represented an invocation of his rights to remain silent and that any further questioning occurred in violation of his *Miranda* rights. The Supreme Court rejected this argument, stating, "[a] defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.'" (*Id.* at pp. 629-630.)

Here, the interrogating officer testified he believed that in saying, "I plead the fifth" defendant was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation.

"If [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth

Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." (*Miranda* v. *Arizona, supra,* 384 U.S. at pp. 473-474 [16 L.Ed.2d at p. 723], fn. omitted.)" However, if an individual "is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent . . . . Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts." (*Id.* at pp. 485-486, and fn. 55 [16 L.Ed.2d at p. 730].)

The law permits the police to "clarify" whether or not a suspect comprehends or waives his *Miranda* rights where the invocation of rights is ambiguous. (*People* v. *Johnson* (1993) 6 Cal.4th 1, 27; *People* v. *Carey* (1986) 183 Cal.App.3d 99, 103.) In the present case, the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.

In order to assert the privilege against self incrimination, defendant's attitude must have been such as to show a present lack of willingness to discuss the case with the police. (*People* v. *Dreas* (1984) 153 Cal.App.3d 623, 630.) By continuing to talk to the officers, defendant demonstrated a willingness to continue to discuss the case.

The second statement which defendant claims was an invocation of his *Miranda* rights occurred after he viewed the videotape of Santos's confession implicating him in the murder. After defendant stated, "I'd like to have an attorney present" the following discussion ensued:

[BISHOP:] "Okey

[CLEMENS:] "OK fine,

[DEFENDANT:] "Sorry, man.

[BISHOP:] "No, don't apologize

[O'CONNOR:] "Okay, 7-12-97, about 22:45, ten forty-five, uh, p.m. on Saturday. This is it. [Tape goes off/on]

[DEFENDANT:] "Lied . . .

[MCDANNOLD:] "Yeah, yeah . . .

[DEFENDANT:] "Abe did it.

[MCDANNOLD:] "Because we don't what the fuck happened. [sic] 'cause you didn't tell us.

[DEFENDANT:] Abe, too?

[MCDANNOLD :] "Probably both of ya. We don't . . . y-you know, you're askin' us questions, that we really can't answer. Because we don't know the answers to 'em. So far, Romey, you know as well as I do, these guys have not lied to you, not one bit. They've told ya the truth, right from the get-go. Now, you're askin' questions that we can't answer. We're not judges, and we're not jurors. We cannot answer that. An' there's a couple of reasons that we can't answer that. Murder, damn sure, his life. But there's a bunch of degrees of murder.

[DEFENDANT:] "Right.

[MCDANNOLD:] "An' "we don't know your side of the story. And now, we can't talk to you.

[DEFENDANT:] "Oh, man, I want to talk to you. I need, I need to talk to you Harry [Bishop].

[MCDANNOLD:] "Listen, we can't . . .

[DEFENDANT:] "I do man.

[MCDANNOLD:] ". . . talk to you because you said you wanted an attorney. We can't talk to you.

[DEFENDANT:] "Well, I can talk. Yeah, I mean, can't I --

[MCDANNOLD:] "What do you have to . . .

[BISHOP:] "Do you want to talk [to] us?

[DEFENDANT:] "I want to talk to you man why I just . . . [Sigh]

[CLEMENS:] "What'd ya wanna do?

[DEFENDANT:] "I'm scared, man. I'm scared.

[MCDANNOLD:] "You should be. You're lookin' right down the barrel of the rest of your life. An' you should be scared. That's what it's all about Romey. But we're tryin' to give you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you.

[CLEMENS:] "He said, he wants to talk to Harry. So . . . can Harry and [Inaudible . . .] talk? . . .

[MCDANNOLD:] "No. Not until he says, I want to talk to him without an attorney. The law says we can't talk to you. Until you say, 'Okay, I was just kiddin' I don't want an attorney.' That's the only way it can happen, Romey. You're the one that said, that you wanted an attorney. An' the law tells us we can't talk to you from that point on. We cannot ask you any questions. We're gonna play by the rules.

[DEFENDANT:] "Okay, I -- I was just jokin'. I don't wanna talk -- Or I want to talk to Harry, the bishop. You know the thing about the attorney, is. . . is wrong or whatever, I don't need an attorney. Is that fair to say so guys don't get busted outta your jobs.

[MCDANNOLD:] "Okay. Let me ask you . . . i-is the tape runnin'?

[O'CONNOR:] "Yes.

[MCDANNOLD:] "Turn the tape on and say into the tape, that you've changed you're changed [sic] mind.

[DEFENDANT:] "I've changed my mine [sic]. It's . . . its . . .

[MCDANNOLD:] "Say it into the tape, you don't want an attorney.

[DEFENDANT:] "I don't want an attorney, I've changed my mind.

[MCDANNOLD:] "Okay, have . . . have you been promised anything?

[DEFENDANT:] "No, I'd just like to get a cigarette.

[MCDANNOLD:] "Okay.

[DEFENDANT:] "Can I get a cigarette though?

[MCDANNOLD:] "Wait a minute, okay? We're gonna clean this thing up, I'm . . . You want -- You're tellin'us you want to do somethin'. An' I'm tryin' to make it legal for you to do it. Okay?

[DEFENDANT:] "Okay.

[MCDANNOLD:] "Has anybody in this room . . .

[DEFENDANT:] "No one's promised me . . . paid me . . . uh

[MCDANNOLD:] "Listen . . . listen, listen to me, okay? Let me do this and do it right okay?

[DEFENDANT:] "All right, I apologize.

[MCDANNOLD:] "Okay. Has anybody in this room promised you anything?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Has anybody in this room threatened you for anything at all?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Do you feel intimidated by anybody in this room?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Do you feel that -- Has anybody in this room, told you that if you didn't talk with us, or you did talk to us, that somethin' good was gonna happen?

[DEFENDANT:] "No, sir.

[MCDANNOLD:] "Okay, so you've made the decision, that you want to talk to us and you do not want an attorney, is that correct?

[DEFENDANT:] "[Pause] Yes, sir.

[MCDANNOLD:] "That's absolutely correct, now you kinda hesitated a little bit . . .

[DEFENDANT:] "Well . . .

[MCDANNOLD:] "You don't want an attorney . . .

[DEFENDANT:] "Yes, sir.

[MCDANNOLD:] ". . . right here in this room . . .

[DEFENDANT:] "Yes, sir.

[MCDANNOLD:] ". . . right now, is that correct?

[DEFENDANT:] "Yes, sir."

Defendant contends it is "apparent from the transcript" that during the time the tape was turned off he was asking what would happen to him as a result of the charges, and that such a question did not waive his right to remain silent, nor did it permit re-initiation of the interrogation.

"When an accused invokes the right to counsel after a *Miranda* advisement, the police must immediately cease interrogation, which can resume in the absence of an attorney only if (1) the accused initiates the conversation, and (2) the circumstances indicate that the accused has made a knowing and intelligent waiver of the right to counsel. (*Oregon* v. *Bradshaw* (1983) 462 U.S. 1039 [77 L.Ed.2d 405, 103 S.Ct. 2830]; *Edwards* v. *Arizona* (1981) 451 U.S. 477 [68 L.Ed.2d 378, 101 S.Ct. 1880].)" (*People* v. *Sims* (1993) 5 Cal.4th 405, 468 (conc. & diss. opn. of Justice Kennard).) However, these two issues are separate, and cannot be melded together. (*Oregon* v. *Bradshaw, supra,* at p. 1045.)

In *Oregon* v. *Bradshaw, supra,* the defendant invoked his right to counsel, and questioning ceased. (462 U.S. at p. 1042 [77 L.Ed.2d at p. 410].) Later, the defendant inquired, "'Well, what is going to happen to me now?'" (*Id.* at p. 1042 [77 L.Ed.2d at p. 410].) The officer responded that the defendant did not have to talk since he had requested an attorney, and that if he talked it had to be of his own free will. (*Ibid.*) The officer suggested the defendant take a polygraph test. The defendant took the test, did not pass it, and subsequently admitted the crime. (*Ibid.*)

In holding the defendant's confession admissible, the court said the initiation of a conversation by a defendant does not itself amount to a waiver of a previously invoked right to counsel, but that the accused himself could initiate further communication, exchanges, or conversations with the police. (*Oregon* v. *Bradshaw, supra,* 462 U.S. at p. 1044.) If such a conversation takes place after the accused has expressed a desire to deal with the police only through counsel, the burden remains upon the prosecution to show the defendant waived his right to have counsel present during the interrogation. (*Ibid.*)

"There can be no doubt in this case that in asking, 'Well, what is going to happen to me now?', respondent 'initiated' further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in Edwards. [¶] Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation." (*Oregon* v. *Bradshaw, supra,* 462 U.S. at pp. 1045-1046.)

Here, if we accept defendant's contention he asked what was going to happen to him next during the brief period in which the tape was turned off, we find no difference between such a question and the query in *Oregon* v. *Bradshaw, supra.* In both instances, the accused initiated a communication with the interrogators indicating a willingness to discuss the criminal investigation. Moreover, the first recorded words out of defendant's mouth were, "[l]ied" then "Abe did it."[4] Certainly, these statements evinced a willingness and desire to discuss the investigation. (*Oregon* v. *Bradshaw, supra,* 462 U.S. at pp. 1045-1046 [77 L.Ed.2d at. p. 412].) Therefore, we hold defendant re-initiated the interrogation.

Whether defendant waived his rights after re-initiating the conversation is a separate issue.

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[4] The officer running the tape recorder testified the recorder was only off for a second, and the only person speaking during the pause in the tape was defendant.

Defendant cites *People* v. *Sims, supra,* 5 Cal.4th 405 in support of his argument. The facts in *Sims* are critically different. There, the defendant was read his *Miranda* rights and signed an admonition form stating he *would not* waive his rights. (*Id.* at p. 437.) As the officers were preparing to leave, the defendant asked "'what was going to happen from this point on[.]'" (*Ibid.*) The officer explained about proceedings for extradition, then told the defendant he had reason to believe the defendant had occupied a motel room prior to the discovery of a body in the room. (*Id.* at p. 438.) The defendant, without expressing his desire to waive his rights, confessed to the murder. (*Ibid.*)

The court held the defendant's offhand question about what was going to happen to him was not a re-initiation of the questioning, and did not constitute a waiver of his *Miranda* rights. (*People* v. *Sims, supra,* 5 Cal.4th at p. 441.) The court specifically distinguished *Oregon* v. *Bradshaw, supra,* 462 U.S. 1039 [77 L.Ed.2d 405] because unlike *Bradshaw*, the "officers did not reiterate the *Miranda* admonition or procure from defendant a waiver of his rights." (*Ibid.*)

Here, defendant clearly waived his *Miranda* rights before making any admissions or confessions. The trial court did not err in finding defendant's statements admissible.

III

Voluntariness

Defendant claims his confession was involuntary because the interrogators: (1) withheld basic needs, including cigarettes and warm clothing; (2) used defendant's mental condition created by his chronic drug abuse as a means of extracting a confession; (3) promised defendant leniency; and (4) questioned defendant outside *Miranda.*

A confession is not admissible as evidence unless it was made voluntarily and without coercion. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208.) A confession is involuntary if the suspect's will was overborne or the confession was not "'the product of a rational intellect and a free will.' [Citation.]" (*Ibid.*) In determining whether an admission was voluntary or coerced, we consider the totality of the circumstances, examining both the characteristics of the accused and the details of the interrogation. (*People* v. *Hogan* (1982) 31 Cal.3d 815, 841, disapproved on other grounds in *People* v. *Cooper* (1991) 53 Cal.3d 771, 836.)

Defendant maintains he was physically coerced into a confession when his repeated requests for a cigarette were denied or ignored. He claims when he finally indicated his willingness to talk he was "rewarded" with a cigarette. He argues, "[g]iven the known addictive nature of cigarettes, withholding them as a means of securing cooperation from the suspect should be recognized as an illegal form of coercive interrogation."

The interrogation lasted approximately two and one-half hours before the officers went to purchase cigarettes for defendant. During that time defendant asked for a cigarette seven times. He was told either he had to wait, or the officers did not have any cigarettes. Finally, near the end of the interview, one of the officers went to buy some cigarettes for defendant.

The cases cited by defendant, *Reck* v. *Pate* (1961) 361 U.S. 433 [6 L.Ed.2d 948] and *Greenwald* v. *Wisconsin* (1968) 390 U.S. 519 [20 L.Ed.2d 77], were decided on very different facts. In *Reck* v. *Pate,* the defendant, who was 19 and mentally retarded, was interrogated six to seven hours at a time for a week, and was subjected to intermittent public exhibition. He was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher. In *Greenwald* v. *Wisconsin*, the defendant, who was on medication twice a day was interrogated for 18 hours without food, medication, or sleep. (*Id.* at p. 520 [20 L.Ed.2d at p. 79].)

Defendant cites no authority for the proposition that the denial of cigarettes constitutes physical coercion, and we are aware of none. We do not find that refusing to let the accused smoke a cigarette during two and one-half hours of questioning was so coercive as to rob him of his free will.

Approximately 25 minutes before defendant requested an attorney, he was taken to a conference room to watch portions of Santos's videotaped confession. Immediately upon entering the conference room, defendant complained of being cold. When he complained again a short time later, he was told they would be finished there soon. He was in the conference room less than 45 minutes. It was the middle of July. This was a fairly short exposure to the temperature in the conference room. Under the totality of the circumstances, we do not see that requiring defendant to remain in the air-conditioned room for this period of time amounted to physical coercion.

Defendant also claims he was psychologically coerced because he was a methamphetamine abuser, and his addiction was a source of "control and manipulation by the interrogators." This argument lacks any support in the record. There is absolutely no evidence that defendant was experiencing withdrawals or other symptoms from not having had any drugs. There is no evidence the officers used his addiction to extract a confession from him.

Defendant claims he was psychologically coerced by promises of leniency. He claims the following statement by Lieutenant McDannold was implied promise of leniency: "there's a bunch of degrees of murder . . . An' we don't know your side of the story . . . . You're lookin' right down the barrel of the rest of your life. An' you should be scared. . . . But we're trying' to give you the chance to talk to us. An' tell us your side of the story . . . ."

"'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied.' [Citation.] Since threats of harsh penalty often contain an implicit promise of more lenient treatment, they are treated as promises of leniency. [Citation.]" (*People v. Cahill* (1994) 22 Cal.App.4th 296, 311.) However, where the benefit pointed out to the defendant is merely "'that which flows naturally from a truthful and honest course of conduct,'" the confession is not rendered involuntary. (*Id.* at p. 312, quoting *People v. Hill* (1967) 66 Cal.2d 536, 549.)

Here, there was no promise of leniency, express or implied. There was no implication that defendant would be charged with a lesser crime or receive a lesser sentence if he confessed. Defendant was never told the police were trying to help him. Defendant was merely told the officers could not answer his questions because they had not heard his side of the story, and that since he requested an attorney, they could not talk to him. Defendant later admitted he had not been promised anything.

Defendant argues his statement was involuntary because he was questioned outside of *Miranda*. However, we have found defendant was not questioned outside *Miranda* thus, this argument fails.

IV

Discovery

Defendant claims the trial court erred in its discovery rulings. He claims the trial court should have required the prosecutor to divulge the "rap sheet" of its witnesses because they may have contained admissible evidence under *People v. Wheeler* (1992) 4 Cal.4th 284, 295, of "conduct amounting to a misdemeanor." He also contends the court erred in sealing records of ex parte hearings.

Defendant filed a motion to compel pretrial discovery. With respect to each prosecution witness he requested any false police reports made by the witness, any probation reports, any pending criminal charges, the probationary status of the witness, and the police reports for all arrests and convictions for the witness. The trial court granted the motion in part, ordering the prosecution to disclose all felony convictions and misdemeanor convictions if the misdemeanor convictions involved a crime of moral turpitude.

Defendant cites *People v. Wheeler, supra*, 4 Cal.4th at page 295, which held that the past criminal conduct of a prosecution witness "amounting to a misdemeanor" is admissible if such conduct bears on the witness's moral turpitude. He argues *Wheeler* permits the admission of conduct involving moral turpitude whether or not such conduct produced a criminal conviction. Therefore, he argues, such conduct should have been discoverable.

The People point out that *Wheeler* is not a discovery case and is not authority for the disclosure of the past criminal conduct of prosecution witnesses, whether or not such conduct produced a conviction.

Section 1054 provides in pertinent part, "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." Relevant to our discussion, section 1054.1 specifies the prosecution must disclose, "(d) [t]he existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial [and] (e) [a]ny exculpatory evidence."

Defendant does not contend the discovery statutes required disclosure of the witness' criminal history. They clearly do not. Instead, he claims the prosecutor had a federal constitutional duty to disclose such information.

People v. Hayes (1992) 3 Cal.App.4th 1238, cited by defendant held: "The prosecution's constitutional duty to disclose all substantial material evidence favorable to an accused 'extends to evidence which may reflect on the credibility of a material witness. [Citation.] . . . '[S]uppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process . . . ." [Citation.]' Thus, '[w]hen the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility' may require a new trial. (*Giglio v. United States* (1972) 405 U.S. 150, 154 [31 L.Ed.2d 104, 108, 92 S.Ct. 763].)" (*Id.* at pp. 1244-1245, fns. omitted.)

The above stated rule stems from the Supreme Court's opinion in *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215], wherein it held "the suppression by the prosecution of evidence favorable to an accused upon request violates duc process where the evidence is material either to guilt or to punishment . . . ." (*Id.* at p. 87.) In *United States v. Bagley* (1985) 473 U.S. 667 [87 L.Ed.2d 481] the court determined the standard of materiality. It held a constitutional error occurs "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. (*Id.* at p. 678.) Thus, there is no due process violation unless the suppressed evidence deprived the defendant of a fair trial.

In the present case, the limitation of discovery of the criminal history of prosecution's witnesses was not unconstitutional. There is no reasonable probability that nay evidence of past bad behavior of such witnesses not resulting in a criminal conviction could have been sufficient to undermine confidence in the outcome.

Defendant makes no showing of what the undisclosed evidence might have been.[5] Moreover, the evidence in this case was so overwhelming, both in terms of guilt and punishment, that there is no reasonable probability that evidence destroying the credibility of any one witness would have made any difference. This is especially true since defendant received discovery of any witness' felony convictions and misdemeanors involving moral turpitude. The likelihood that some other less serious bad act could have made a difference, if admissible, is remote at best.

Defendant also argues the trial court erred in sealing records pursuant to section 1054.7. Section 1054.7 allows disclosure of information to be restricted for "good cause." "Good cause" is defined as "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."

The trial court granted, over defendant's objection, a request for an ex parte hearing pursuant to section 1054.7. The court sealed the record of the ex parte hearing. Prior to trial, defendant petitioned this court for relief from the trial court's ruling. We denied the petition for writ of mandate. After the trial was concluded, defendant filed a motion in this court to unseal the record. We denied the request to unseal the record. Defendant now contends that the trail court's decision to seal the records was in error, and that he should now be allowed access to the records.

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[5] Defendant requests we take judicial notice of a Request for Dismissal in a criminal action against Ward. This document was not presented to the trial court. The request is denied. (*Vons Companies, Inc. v. Seabest Food, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

We have reviewed the sealed transcript of the hearing, and find there was good cause as defined in section 1054.7 for the transcript of the hearing to be sealed, and that there is good cause for the transcript to remain sealed.

V

Mistrial

Chris Ward testified that some time prior to the murder defendant thought Clark had stolen a laser light pen from him, and told Ward he would "get" Clark. He also testified about the exchange of a gun between Santos and defendant. Detective Berg interviewed Ward shortly after the murder. At trial, Ward testified Berg threatened him during the interview, and testified he had recalled the events better when interviewed by Berg than he did at trial.

With the court's permission, the prosecution played the tape recording of Berg's interview with Ward to show Ward had not been threatened and had not had trouble recalling the events about which he testified. The jury was given a transcript of the recording. On the recording, Ward stated either Santos's or defendant's girlfriend said "they'd" killed Clark. Defense counsel immediately objected and the jury was excused. On the next page of the written transcript there was a similar statement by Ward that someone named Jeff Lee stated Santos had killed Clark.

The defendant moved for a mistrial. The court decided instead to admonish the jury and to dispense with the playing of the remainder of the tape. The court gave the following admonishment: "Ladies and gentlemen, as you will see, the transcripts are no longer on your chairs and the tape has been turned off. The tape was offered by the District Attorney for the purpose of demonstrating what he felt would be inconsistencies between the trial testimony of Mr. Ward given here yesterday and statements that he made, purportedly, on tape. [¶] The Court was given what is called an offer of proof, and in the legal world, an offer of proof means that when it is necessary for an attorney to explain what it is that he or she wishes the jury to hear, the Court needs to have an understanding beforehand, and an offer of proof is made, an offer as to what the evidence will show. [¶] The offer of proof that was given in this case by the District Attorney turned out to be inaccurate and incomplete in a material way. And when it was discovered as the tape was played that the information that was included on the tape was beyond that which had been represented to me and to opposing counsel of the District Attorney to be on the tape it was apparent to me that, number one, the purpose for which the tape was being offered was an improper purpose. And, number two, that which had been set forth on the tape that you heard must be disregarded by you. It has no probative value. No weight whatsoever. What the person said on the tape in response to questions would have been precluded on an appropriate evidentiary objection if that person had been sitting here on the witness stand. [¶] So things were said, but the rules of evidence in our case expressly preclude it because of the rules of evidence which are rules of reliability. The District Attorney's actions in this regard were improper.

I do not ascribe a wrongful intent to the District Attorney's Office. But they were improper because they were done without care. And the information that was provided to you was inappropriately presented to you and you may consider that in your determination of the ultimate facts in the case."

After Berg's testimony, the court again admonished the jury: "Ladies and gentlemen, by way of clarification, I previously admonished you that you may not consider for any purpose anything that you heard on the audiotape. To the extent that attorneys have asked the witness questions and the witness had been permitted to answer by reference to a transcript of the tape, you may consider. But what you heard on the tape, disregard it entirely because I have stricken it."

Later, outside the presence of the jury, the court clarified its ruling on the motion for mistrial: "Now, I'm going to note because I don't think I did previously for the record, that the reason that I chose to deny the defense motion for mistrial is not because the statement that came out before the jury wasn't prejudicial to the defendant or in the nature of the inadmissible evidence. It should be clear that it was prejudicial and it was inadmissible and it was unquestionably heard by the jury. The reason for the denial of the motion is that the quality or character of that which was said as attributed to Charlotte was not the kind of knife-edge precision statement that if relayed by this second layer of hearsay might have made the result different on this motion for mistrial. I don't take lightly what occurred. But it – it's, ultimately, my view that a strong admonition because of the indefiniteness and the lack of specificity of the statement attributed to Charlotte did not rise to such a level of prejudice that defendant would be deprived of a fair trial or that the damage done could not be undone by a sharp admonition. And it was for that reason that I denied the motion and for those reasons that I gave the admonition which was given to the jury. . . ."

"'The legal principles relating to a motion for a mistrial are well settled. To start with, a motion for a mistrial presupposes that the effect of the objectionable evidence "is so prejudicial as to be incurable by striking it and admonishing the jury to disregard it. In other words, a motion to strike presupposes error of some sort, whereas the motion for mistrial presupposes error plus incurable prejudice." [Citation.] Moreover, it is widely recognized that a motion for a mistrial is addressed to the sound discretion of the trial court and it may be properly refused where the court is satisfied that no injustice has resulted from the occurrences of which the party complains. [Citations.]'" (*People v. Szarvas* (1983) 142 Cal.App.3d 511, 526.)

Where an admonition is given to disregard inadmissible evidence, the jury is presumed to have followed it. (*People v. Allen* (1978) 77 Cal.App.3d 924, 934; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374; *People v. Williamson* (19858) 172 Cal.App.3d 737, 750.) It is only in exceptional cases that the effect of the improper evidence is insufficient to overcome the substantial danger of undue prejudice. (*People v. Allen, supra*, at p. 935.)

Here, we agree with the trial court that the character of the evidence was not such that defendant was deprived of a fair trial because the jury heard the evidence. The jury had already heard defendant's own confession. Defendant was not prejudiced because the jury heard a double hearsay statement to the same effect.[6] The trial court did not abuse its discretion in denying the motion for mistrial.

VI

Evidence of the Victim's Racism

The prosecution made a motion in limine to exclude the testimony of defense witness Clopher Dotson. The motion stated: "Clopher Dotson met the defendant at High Desert Prison. He states that the defendant was always concerned about his safety while in prison. He observed the defendant to be 'hyper' to the word 'nigger' when it was used as a racial slur and would offer violence to those who used that word. However he never saw him actually use violence against anyone. . . . [Dotson's] testimony about the word 'nigger' and its effect on the defendant is irrelevant unless there is competent evidence to show that the victim used that word in a negative manner towards the defendant at the time of the murder. In other words, Mr. Dotson's testimony would try to raise an inference that such a word was used by the victim without any substantial basis for that inference, only that the defendant reacted that way in the past to the word's use by others."

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[6] Defendant also argues the transcript contains the statement by the officer that he had talked to a million people, and that people told him Ward heard defendant and Santos talk about "it." He claims this was crucial to the defense that the shooting was not premeditated. However, the court stopped the tape and dismissed the jury at the end of page five in the transcript. The statements of which defendant complains were at the bottom of page 10, making it highly unlikely any juror even saw the statements.

The trial court agreed with the prosecution. The court granted the motion, but stated that if evidence should be offered to indicate defendant and Clark had race-based confrontations, that would "change the landscape." There was also evidence Clark had a cover up tattoo – one tattoo superimposed upon another. The prosecution asserted a relevance objection to questioning regarding the tattoo, and the nature of the underlying tattoo was not revealed. Based on comments made by the trial court, defendant asserts the underlying tattoo was a swastika.[7]

Defendant cites *People v. Minifie* (1996) 13 Cal.4th 1055 in support of his argument that evidence of Clark's old tattoo and defendant's sensitivity to racial epithets should have been admitted into evidence to show he was provoked into the attack on Clark. In *People v. Minifie*, the Supreme Court held evidence of third party threats against the defendant were admissible where the third parties were associated with the victim and the threats reasonably tended to corroborate the defendant's fearful state of mind.

People v. Minifie and the cases on which it relied do not support defendant's proposition. In *Minifie*, the court allowed evidence of threats because they were relevant to the defense of self defense, which requires an honest and reasonable belief that one is about to suffer bodily injury. (*People v. Minifie, supra*, 13 Cal.4th at p. 1064.) The court recognized that evidence the victim threatened the defendant would clearly be admissible. (*Id.* at p. 1065.) The only issue was whether threats of persons other than the victim were admissible. The court stated that a defendant claiming self defense must prove he was in fear for his life and the reasonableness of such fear, and that threats from a group would color a person's perceptions as much as threats from an individual. (*Id.* at pp. 1065-1066.) The court stressed the evidence was admissible because the law of self defense centers on the defendant's perceptions, not on the acts and intent of the victim. (*Id.* at p. 1068.)

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[7] The trial court said: "And it's not enough to say that Clark had a tattoo on him that was a Swastika because, quite frankly, in the – it's sad to say in the current culture that is a rather prolific sign and doesn't necessarily equate to things that these hypothetical witnesses will be saying."

The theory of provocation to which defendant claims the excluded evidence was relevant requires the defendant's reason to have been so disturbed or obscured by passion as to render ordinary men of average disposition liable to act rashly or without due deliberation and reflection. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Wickersham* (1982) 32 Cal.3d 307, 326; *People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Valentine* (1946) 28 Cal.2d 121, 139.) "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' [Citation.]" (*People v. Wickersham, supra*, at p. 326.) Because there was no evidence the victim provoked defendant, evidence of the victim's racial prejudice and the defendant's racial sensitivity was irrelevant and potentially confusing to the jury. The court did not err in excluding the evidence or in refusing to instruct on heat of passion manslaughter.

VII

Zelaya's Testimony

We do not address defendant's claim he should have been allowed to cross examine Zelaya as to whether he thought testifying he would gain some benefit from the police. Defendant was allowed to ask Zelaya whether the police actually offered him any consideration for testifying. As a related matter defendant argues the court should not have instructed the jury it could consider his attempts to suppress evidence as consciousness of guilt. Defendant makes no showing as to how either of these, if error, could have prejudiced him. In light of defendant's confession to the murder, we find any error in suppressing evidence of Zelaya's belief, however unfounded, that he would benefit by testifying, or in instructing the jury it could consider efforts to suppress evidence as consciousness of guilt to be harmless. It is not reasonably probable that a result more favorable to defendant would have been reached in the absence of any error. (*People v. Watson* (1956) 46 Cal.2d 818.

VIII

Rulings re: Mental State

Defendant claims a trio of trial court rulings "emasculated [his] defense" by excluding evidence his confession was not credible because it was coerced, by refusing to allow his expert to pose a hypothetical question, and by permitting the prosecution's expert to render an opinion on the effect of drugs on behavior.

a. Evidence Confession was Coerced

The jury heard an edited version of the interrogation which included defendant's confession. During trial, defendant's counsel informed the court he intended to question the two officers who interrogated defendant about the psychologically coercive character of the interview in order to show defendant's confession was not credible.

Specifically, defendant wanted to show he made certain representations about his mental state which were not true. He hoped to show the circumstances of the interrogation made him want to accommodate his interrogators and tell them whatever they wanted to hear. He claimed because of his self-image and behavioral background, he hated being perceived as being out of control. He theorized that because of this, he did not want to characterize the killing as a spontaneous, irrational act.

The court ruled defendant could question the interrogating officers about any inconsistencies in defendant's statement as such inconsistencies might bear on the truthfulness of his statement, but could not "challenge directly or indirectly the confession in the sense that the Court has to perform that analysis on the 402 hearing in advance of the – in advance of the trial, that's water under the bridge, so that will be disallowed." The trial court later clarified it would not let the defense introduce the interrogating officer's testimony concerning defendant's efforts to terminate the interrogation, to lie down, to have a cigarette, or have a lawyer present, because those areas were relevant only to the issue of voluntariness and coercion.

In *Crane v. Kentucky* (1986) 476 U.S. 683, 688-689, the Supreme Court stated: "the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. [Citation.] But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence." The court held the Constitution guarantees criminal defendants "'a meaningful opportunity to present a complete defense[,]'" and that the "opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." (Id. at p. 690.)

The trial court's ruling did not violate *Crane*. The court gave defendant the opportunity to call McDannold to question him about inconsistencies in defendant's statements to police, but defendant did not call McDannold. Nor did defendant question O'Connor, an officer present during the interrogation, about the inconsistencies in his statements or the circumstances surrounding his confession. Defendant never sought to offer the entire taped confession, and in fact sought to have the exculpatory portions excluded.

The court allowed and the jury heard evidence regarding the time of day defendant made his confession, the duration of the interview, its location, and the number of officers involved. Evidence was presented of defendant's emotional state, his requests to lie down during the interview, and his claim he recently used methamphetamine. There was also testimony the officers accused defendant of lying, repeatedly asked defendant to explain the circumstances of the crime, and yelled at him. Thus, the jury heard evidence regarding "the physical and psychological environment that yielded the confession . . . ." (*Crane v. Kentucky, supra*, 476 US. at pp. 688-689.)

In addition, there was other sufficient evidence to tie defendant to the crime. The murder weapon was recovered where defendant said he and Santos disposed of it. Defendant was seen with the murder weapon before the killing. Defendant left Kuykendall's house with the intent of finding Clark. Two witnesses saw defendant with Clark and Santos at the crime scene shortly before the murder. Blood stains on defendant's clothes were consistent with the victim's DNA. Footprints and tire marks matching defendant's were found at the scene. Live .22 casings similar to the spent casings found near Clark's body were in defendant's car. An officer heard defendant say he and Santos would have gotten away with murder if Santos had kept quiet. The evidence of defendant's guilt was overwhelming and it supports the credibility of defendant's confession. It is beyond a reasonable doubt the verdict would have been the same even if the jury had heard evidence of the circumstances surrounding the interrogation.

As to defendant's mental state, the evidence defendant proposed to offer below was expert testimony that because of his "self-image" and "behavioral background" he depicted the killing as calculated and premeditated rather than as a spontaneous, irrational act. However, the circumstances of the interrogation had no bearing on the defendant's self-image or behavioral background.

Moreover, the jury found defendant murdered Clark while lying in wait. This finding obviated any other evidence of premeditation. (1 Witkin & Epstein, Cal. Criminal Law (2nd ed. 1988) Crimes Against the Person, § 458, p. 518.) The physical evidence showed the victim was shot execution-style at close range. He had no defensive wounds. He died holding his cigarette lighter with one hand and appeared to have dropped his methamphetamine pipe with the other. There were no signs of a scuffle, so that he appeared to have simply fallen down where he died. Shortly before the murder, witnesses saw Clark with defendant in a remote area, and there was no testimony Clark appeared to be frightened of defendant. The evidence of lying in wait was so overwhelming that it is beyond a reasonable doubt the verdict would have been the same even if the jury had heard additional evidence of the circumstances surrounding the interrogation.

b. Expert Testimony re: Defendant's Mental Condition

Defendant proposed to present the expert testimony of Dr. Pierce Hurley, M.D. Defendant stated Dr. Hurley would give an opinion, "based upon hypothetical scenarios, as to the cognitive process and responses of and the effect thereon an individual of a clinical presentation described in terms identical to those diagnosed in defendant, when confronted with factual events consistent with the facts of this case. He will testify as to defendant's mental state at or about the time of the events leading up to and culminating with the offense charged in this case.

The court expressed its concern over the defendant's proposed use of a hypothetical:

"[THE COURT:] But if you pose a question in hypothetical terms, then you are identifying a specific hypothetical person. And since the hypothesis can only relate to relevant matter or evidence you expect to connect up later what, in effect, you are doing, . . . is running afoul of the prohibition set out in Penal Code [section] 29.

"If you have a person who has the following characteristics, A, B, C and D, and you put them in a situation where they just used such and such a substance and you put a gun in their hand and you turn them loose, will they be able to intend to put a bullet in somebody's head?

[DEFENSE COUNSEL:] "That's not the hypothetical, though, your Honor.

[COURT:] "Why don't you tell me what it is. . . . If the question is posed as a hypothetical, I want you to assume, Doctor, for the sake of this question that we have a person and that person has the following characteristics, and then you put him into some particular setting and then you ask him what will they do or what propensity will they have to do such and such a thing, what, in effect, is occurring – I'm not suggesting it's deliberate – but it appears to me that what is being invited is that which is prohibited by Penal Code 29, which is to ask the expert to opine as to whether in the particular instance at hand the defendant had the required mental state. . . .

"The bottom line is that in this subject matter area, by the terms of the Penal Code, the expert cannot opine as to the ultimate fact in this instance, the formation or nonformation of specific intent. The expert can and has in response to your questions provided a frame of reference to the jury as to how the mental processes or whatever he called it, defective disorder, those are the terms certainly used in the code possessed by [defendant], in the witness's view, and how the intoxication and chronic use of methamphetamine can have an impact on thought processes of people generally. And that – that evidence in and of itself provides assistance and that's why it was, I believe, relevant and admissible and I allowed it.

"But I don't believe that by posing a hypothetical question to sort of sum up – to say, well, we have learned all these things, now, Doctor, I want to pose this hypothetical, assuming this – this person has the following characteristics, ... He himself cannot offer that ultimate fact. That's how I read 29."

Section 29 provides, "any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

In *People v. Nunn* (1996) 50 Cal.App.4th 1357, the court held section 29 precluded the defense expert from testifying that because of the defendant's psychological profile and level of inebriation, he had fired his weapon impulsively. It stated the trial court had appropriately excluded expert testimony which *concluded* the defendant had acted impulsively or without the intent to kill. (*Id.* at p. 1365.)

We agree with the trial court that a hypothetical question as the defendant appeared to propose would have called for an improper conclusion on the part of the expert as to the defendant's mental state. It is not clear exactly what the hypothetical question would have been, but the question as framed by the court clearly would have called for the expert to give his opinion that defendant did or did not have the required mental state for murder. Despite the court's invitation, defense counsel did not propose any other hypothetical question that would not run afoul of section 29. Under these circumstances, the court did not err in refusing to let defendant's expert answer a hypothetical question about defendant's mental state at the time of the killing.

c. *Toxicologist's Testimony*

Robert Perkins, a toxicologist with the California Department of Justice, testified for the prosecution. He described his job as analyzing biological samples (i.e., blood and urine) for the presence of drugs. He testified he analyzed defendant's blood drawn on July 12th for the presence of methamphetamine, and found the drug present in the amount of 40 nanograms per milliliter. The prosecutor asked him to give the jury an idea on the "grand scale of dosages or quantitative levels, what that means?" Defendant objected for lack of foundation, but the court allowed the question "to give the jury a lay person's understanding of the concentration."

Perkins responded that levels associated with methamphetamine abuse would be 100 nanograms and above, although he had seen levels as high as 2,000 nanograms. He indicated the prescription level of methamphetamine is 10 to 30 nanograms. Perkins stated at 40 nanograms a person "might be jittery, feel some heart palpitations, might be very similar to that extra two cups of coffee that you have on Saturday morning, just when you feel wired up. . . . To somebody who's an abuser of the drug at that level, I would predict that they would not have any real discernible symptoms. That's an extremely low level for an abuser."

Defendant argues Perkins was not qualified as an expert to testify to the mental effects of methamphetamine, and that Perkins's testimony was detrimental to his effort to prove lack of premeditation because of drug abuse and psychological condition.

In the present case, the only expert qualification Perkins was shown to have was in analyzing biological samples for the presence of drugs. There is no evidence in the record he was qualified to testify to the effect of drugs on the body.

However, any error was harmless. Perkins also testified the half life of methamphetamine was between 12 to 34 hours, thus it was possible that at the time of the murder, defendant had as much as 5,000 nanograms of methamphetamine in his bloodstream. This according to both Perkins and the expert pathologist would have been consistent with drug abuse. Perkins's testimony to the effect of 40 nanograms on the body was thus irrelevant.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

DAVIS, J.

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SHASTA

DATE: June 17, 1998 DEPT. 4
HONORABLE STEVEN E. JAHR
jz

#97F5048
PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff(s),
vs.
JEROME ALVIN ANDERSON,
Defendant(s).

NATURE OF PROCEEDINGS: MEMORANDUM OF DECISION ON MOTION TO SUPPRESS EVIDENCE AND MOTION IN LIMINE; ORDER

The noticed motions of defendant to suppress evidence obtained in the search of an automobile and to exclude the defendant's statements made during the course of an interrogation came on regularly for hearing on June 2, 1998, both sides appearing, offering evidence, and arguing the questions. The court has considered the evidence and arguments in light of the authorities forwarded and will address each motion, in turn.

1. MOTION TO SUPPRESS EVIDENCE

This case involves a shooting homicide concerning which the decedent's body was located on East Stillwater Road in Shasta County on July 9, 1997 in the afternoon hours. Two persons who traveled that rural roadway in the early afternoon observed a clean white automobile with black striping on the sides on the road. Willis Neeley observed the vehicle twice, once at approximately 1:05 p.m., when he was traveling in the course of his occupation and once at approximately 1:25 p.m., on his return. The vehicle was parked facing south on the "lower" Stillwater Road and he observed it from the upper road. Two males were standing near the left rear portion of the vehicle and one male who was African-American was standing on the right side with his hands at the side. It was in this general location that the body was later located. Christine Coffey heard a loud noise shortly before 1:05 p.m., and thereafter saw a vehicle coming northbound up Stillwater Road. It was a white automobile with a Ford decal and with black trim accessories. She didn't know at the time whether it was a Mustang, an Escort or a Tempo (she could not think of the latter name when she first spoke with the police later that day) but later identified it as a Mustang because her neighbor has virtually an identical car, though not with tinted windows, which she observed on the subject vehicle also was a "shiny nice car of early 90's vintage".

Detective Ron Clemens of the Shasta County Sheriff's Office responded to the homicide scene on East Stillwater Road at or about 3:00 p.m., on July 9, 1997, the report having been called in at 2:30 p.m.

Sergeant David Compomizzo, also of the Shasta County Sheriff's Office, observed tire marks of 3-4 feet in length south of the victim's feet at the scene which included spin-out marks. The tracks were distinctive in that, upon measurement, the east tire track was 6½ inches in width at the top of the dirt where the measurement was taken, whereas the west tire track was7 inches in width.

On July 10 a "BOLO" was put out for a specific type vehicle, a white two door sedan with a black stripe, stock wheels and bright and shiny, possibly a Mustang. On July 11, a white Ford Mustang coupe came to the attention of Sgt. Compomizzo at an apartment complex on Dogwood after it had apparently been called in as a vehicle that didn't belong in the parking lot of that apartment complex. Compomizzo observed the vehicle for approximately 5 minutes. He visualized the treads of the tires which appeared "similar" to the tread marks which he had observed at the scene of the homicide. He later became involved in the "rolling surveillance" of this vehicle through an Enterprise neighborhood ending at an address at on Polaris Street.

Witness Clemens was also one of the officers who responded to the "rolling surveillance" in the afternoon hours of July 11, 1997, as did Lieutenant Harry Bishop, also a witness. They gave a generally consistent account of the events of that rolling surveillance and its conclusion. The defense put on as witnesses Trudi Benham, the defendant's fiancee, Charlotte Anderson, the defendant's sister, and Vicky Dzwonek. The defendant is her son's uncle. The People also offered the evidence of Detective Michael Ashmun, Lieutenant Bradd McDannold, and Detective Tom O'Connor.

It is contended by the People that at the conclusion of the surveillance when the vehicle parked at a residence on Polaris, officers approached the vehicle, ordered the occupants to exit the vehicle and obtained the consent of the operator, Trudi Benham, to search the vehicle. The defense characterizes the contact as being more in the nature of a "felony stop" and that by the tactics employed by the officers, including the purported use of loud language and the pointing of multiple firearms, any consent that may have been given by Trudi Benham was vitiated. Further, the defense contends that there was no probable cause to make a "stop" and that for these reasons, the fruits of the search of the vehicle must be suppressed.

First of all, and as to the probable cause to identify this vehicle and surveil it, the combined testimony of witnesses Neeley and Coffey presented a rather specific matching description of a Ford Mustang, white in color, shiny in condition, with a black stripe on the side and tinted windows. The vehicle was placed close in proximity and in time to the location of the homicide victim on a rural road and to percipient observation, the tire tread patterns of the vehicle's tire appeared similar to those in the dirt within feet of the decedent's body.

As for the contact with the vehicle's occupants, it is not disputed that Trudi Benham drove a seemingly aimless course throughout the neighborhood in Enterprise while being followed directly by witness Bishop. It is also not disputed that no "stop" was effected in the sense that Trudi Benham was prohibited from driving to her ultimate destination, a residence on Polaris occupied by Vicky Dzwonek. It was uncontroverted that Bishop was correct in his ascertainment that the occupants of the vehicle recognized that they were being followed by law enforcement agents and that the vehicle was driving in a fashion suggesting avoidance, although not reckless evasion.

The officer witnesses testified that they did not draw their weapons and did not observe other officers do so at the point when the vehicle stopped at the Polaris Street residence. They testified that they did not block that vehicle in the driveway at Polaris Street and that they did not observe others do so. They testified that firm commands were issued for the occupants to leave the vehicle, which they were allowed to do without persons being taken into custody. Trudi Benham, the operator of the vehicle, was approached and asked for consent to search. In the meantime, the defendant, a back seat passenger, hailed Bishop, with whom he was acquainted, got out of the car and became engaged in a conversation with Bishop. All of the Sheriff's vehicles were unmarked detective vehicles and all of the Sheriff personnel (somewhere in the neighborhood of 6 to 7) were in plain clothes. According to officer testimony, none of their vehicles was parked in such a fashion such as to block Polaris Street itself.

By contrast, the defense witnesses characterized the officers as having pulled up in a number of cars, blocking the driveway and the street and having emerged from their vehicles and moved toward the defendant's car with guns drawn and pointed, shouting loud commands to leave the vehicle. Trudi Benham indicates that she handed over the keys to the officer on request, believing she had no choice. Defense witnesses indicated that they were in various states of fright or terror in light of this conduct.

The defense witnesses' version of this contact at the Polaris Street residence is not credible. First of all, the approach by detectives to the vehicle as characterized by the defense witnesses, by which they surrounded the vehicle with guns drawn and aimed while shouting loud commands would reveal, if true, an organized plan to overwhelm and subdue all occupants by means of force. If that was the plan, the law enforcement officers would not have allowed this vehicle to travel to a place of its occupants' choosing. In other words, they would not have permitted the occupants to select the theater of engagement. Rather, if the officers intended to approach the vehicle in the fashion described by the defense witnesses, they would certainly have blocked and encircled it at a location in the Enterprise area over which they could more confidently exert control.

More importantly, however, are the crucial inconsistencies in the testimony of defendant's fiancee, the vehicle's operator, Trudi Benham. At one point in her testimony, she indicated that she knew that her vehicle was being followed and identified the person following her as Bishop. Yet she testified at a later point that she did not identify Bishop until he was introduced to her by the defendant at the Polaris Street residence. Elsewhere in her testimony, she provided strikingly contradictory testimony regarding the keys to the car, evidencing, in the court's view, fabrication of evidence concerning the encounter.

Defense witnesses, Charlotte Anderson, the defendant's sister, who gave testimony consistent with that of Trudi Benham, testified that she did not later speak with the defendant about this incident even though the defendant, who briefly went voluntarily to the Sheriff's Office to speak with law enforcement officers following the encounter on Polaris, later went home and was with family members, including Charlotte Anderson, before he was arrested the next day. That there was no discussion about this event with the defendant is simply not believable testimony.

What emerges as the more convincing version is a firm but brief encounter which occurred based upon sound probable cause that the vehicle closely met the description of one which was seen at or about the time the homicide victim's body was discovered on a remote road. The probable cause was fortified by furtive driving maneuvers on the part of Trudi Benham. The evidence supporting the probable cause to identify the vehicle and surveil it is more convincing than that opposed to it. So is the evidence supporting the assertion that the search was ultimately conducted with the actual consent of the ostensible owner/possessor, Trudi Benham, defendant's fiancee. She was not coerced. The defendant's cooperativeness with the officers during the contact was never disputed. Indeed, he appeared to facilitate cooperativeness and made no assertion opposing the vehicle search. For these reasons, the motion is **denied**.

2. MOTION IN LIMINE TO EXCLUDE DEFENDANT'S STATEMENTS

On the day after the search of the automobile, July 12, 1997, the defendant was taken into custody on a parole hold and while in custody was interrogated between approximately 8:30 p.m., and midnight, a span of roughly 3½ hours. The court has listened to the audio tapes of the interrogation interview (Defense Exhibits A-G) and has read the transcription of the tapes, as well (Defense Exhibit H).

During the course of the interrogation, defendant confessed to the shooting.

At the Evidence Code 402 hearing, in addition to argument, evidence was presented by Shasta County Sheriff Lieutenant Bradd McDannold who was one of the interrogators, and Detective Tom O'Connor, who also participated in the interrogation.

Initially it should be noted that while a Miranda advisal was given, no express waiver was solicited. An express waiver is not required under circumstances in which it may be established from the surrounding facts that the suspect desires to speak. (People v. Whitson, [1998] 17 Cal.4th 229, 246-250.) Particularly, the burden of proof is on the People to show by a preponderance of the evidence that there was an intelligent and knowing relinquishment of the Miranda rights. (People v. Markham, [1989] 49 Cal.3d 63, 71.) In this instance, from the totality of the circumstances the court finds that the evidence supporting a knowing and intelligent waiver and relinquishment of rights is more convincing than that opposed to it.

It should also be noted that there were points in the tape when the defendant stated or inferred that he would prefer to continue the interview at a later time. Such comments do not vitiate a waiver so long as there is no further showing of a reluctance to talk when questioned. Uncertainty as to when the suspect wishes to talk does not invalidate an otherwise unambiguous expression of a willingness to do so. In this case, the court finds that willingness to speak was demonstrated in the dialog which followed defendant's comments indicating a desire to continue the interview later. (People v. Bolden, [1996] 44 Cal.App.4th 707, 712-713.)

With respect to the overall environment of an interview or interrogation, the court must ascertain if statements have been extracted by way of coercion which renders the statements involuntary. If such a finding is made, the statements, including confessions, must be suppressed. (People v. Haydel, [1974] 12 Cal.3d 190, 197.)

The court has assessed the overall environment of this interrogation which took place in more than one interview room at the Shasta County Sheriff's Office. During the course of the interrogation, the interviewing officers offered to play for defendant a tape of purported confessions/admissions of the defendant's alleged co-participant, to which the defendant agreed. From the dialogue that follows, it appears as if the electronic equipment that was available in the initial interview room wasn't functioning; so the participants moved to another interview room for that purpose. Portions of the tape as it was being played for the defendant are actually audible on the audio tapes that were received in evidence in connection whit this motion. There was nothing about either physical environment that suggested coercion or oppression.

In analyzing the motion presented, the court must ascertain if the confession that was ultimately given by the defendant was the product of a rational intellect and of free will. The court must be satisfied, if the motion is to be denied, that the confession was not obtained in an environment in which the defendant's will was overborne such that the confession was not voluntary. Here, from the totality of the circumstances, the court determines that the ultimate confession was voluntary. It does not appear to the court that the defendant's will was overcome. Rather, his conscience simply came to the fore.

The interrogation was not overly lengthy. The defendant was not deprived of the opportunity to use the restroom. During the course of the latter portions of the interrogation in which he indicated a willingness to discuss the incident, he was provided cigarettes, for which he had made earlier requests. The questioning was, at times, vigorous, but it was not abusive. The court is of the impression that the defendant was "holding his own" in maintaining non-involvement until after he witnessed the tape of a co-participant who implicated him entirely. It was that factor, apparently, which led to the confession in issue.

It is indeed the case that the defendant made requests for food which were not honored and that he remarked that he would like to continue the interview at a later time because he was tired. He also stated that he was cold. There is no evidence to reveal, however, that there was anything about the air temperature in the Sheriff's Office at that time that would lead to a coercive environment. Far more likely is the prospect that the defendant was more than a little uncomfortable given the circumstances of his later professed involvement as the shooter. Since the interrogation lasted no more than 3½ hours, it cannot be said that the rejection of the request for food was unreasonable or coercive. Generally speaking, and while the officers from time to time challenged the defendant's veracity, they treated him politely, not harshly. He requested that Detective Harry Bishop, whom he knew from earlier contacts (according to testimony given at these hearings, he was an informant for Bishop) be present. The request was honored. From the totality of the circumstances, the court concludes that the defendant wished to speak with the officers and voluntarily did so.

Beyond the general determination of the voluntariness, the court must analyze two separate circumstances involving the purported invocation by the defendant of the right to counsel and the purported invocation by the defendant of the right to remain silent.

During the course of the interview (at page 119 of the transcript, Exhibit "H") an exchange occurred between the defendant and Lieutenant Harry Bishop and Detective Ron Clemens in which the two officers urged the defendant to come forward with the truth because they, themselves had been truthful with him and advised that they had a tape of his co-participant which implicated him. Also participating in the discussion that ensued are Detective Tom O'Connor and Lieutenant Bradd McDannold. The conversation is as follows:

HB: "Yeah, it is. An' it's your time. It's just your time."

JA: "I'd like to have an attorney present."

HB: "Okey."

RC: "OK fine,"

JA: "Sorry, man."

HB: "No, don't apologize."

TO: "Okay, 7-12-97, about 22:45, ten forty-five, uh, p.m. on Saturday. This is it." [Tape goes off/on]

JA: "Lied..."

BM: "Yeah, yeah..."

JA: “Abe did it.”

BM: “Because we don’t what the fuck happened. ‘Cause you didn’t tell us.”

JA: “Abe, too?”

BM: “Probably both of ya. We don’t ... y-you know, you’re askin’ us questions, that we really can’t answer. Because we don’t know the answers to ‘em. So far, Romey, you know as well as I do, these guys have not lied to you, not one bit. They’ve told ya the truth, right from the get-go. Now, you’re askin’ questions that we can’t answer. We’re not judges, and we’re not jurors. We cannot answer that. An’ there’s a couple of reasons that we can’t answer that. Murder, damn sure, his life. But there’s a bunch of degrees of murder.”

JA: “Right.”

BM: “An’ we don’t know your side of the story. And now, we can’t talk tc you.”

JA: “Oh, man, I want to talk to you. I need, I need to talk to you Harry.”

BM: “Listen, we can’t...”

JA: “I do man.”

BM “... talk to you because you said you wanted an attorney. We can’t talk to you.”

JA: “Well, I can talk. Yeah, I mean, can’t I–”

BM: "What do you have to ..."

HB: "Do you want to talk us?"

JA: "I want to talk to you man why I just ... [Sigh]"

RC: "What'd ya wanna do?"

JA: "I'm scared, man. I'm scared."

BM: "You should be. You're lookin' right down the barrel of the rest of your life. An' you should be scared. That's what it's all about Romey. But we're tryin' to give you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you."

As this passage in the transcript reflects, there was an unequivocal invocation of the right to counsel and the tape was turned off. During the hearing, witness McDannold testified that the defendant kept talking and made inquiries about the punishment, the death penalty and his future. Detective O'Connor, who was operating the tape player, testified that the tape was off but one second and that since defendant continued to talk, without prompting, he turned it back on immediately.

After an invocation by a suspect of the right to counsel, police may not initiate further questioning of the suspect without counsel present unless the suspect initiates further communication in which case an interrogation that follows is not improper. (Edwards v. Arizona, [1981] 451 U.S. 477, 484-5.) A suspect may, after invoking the right to counsel, change his or her mind and reinitiate the interview so long as it is not reinitiated by the officers, i.e., in order for the interview to continue, it must occur without the intervention of the officers. (People v. Marshall, [1990] 50 Cal.3d 907, 923-926.)

In this instance, from the transcript, the tapes, and the testimony of witnesses McDannold and O'Connor, the court concludes that there was an express invocation, the invocation was honored and the defendant, himself, immediately continued voluntarily to discuss the matter and engaged the officers in conversation. The defendant made it clear that he wanted to speak with the interviewers despite his invocation of the right to counsel and on following pages of the transcript it was explained to him that if he wished to do so, he would have to expressly state on the tape that he did not want an attorney, which he did. There appeared from the audio tape and the transcription nothing coercive about the dialog associated with a clear waiver of counsel following the invocation. He was not threatened with harm or promised a benefit. (These entries are contained generally on pages 120-123.) Accordingly, and pursuant to the referenced authority, the court concludes that the confession is not inadmissible in the light of the invocation because an immediate knowing and intelligent waiver followed based upon an initiation of further communication by the defendant.

The second area of concern appears earlier in the interrogation and is found at page 79 of the transcript. At that point a conversation was taking place between Detective O'Connor and the defendant which is as set forth below:

JA: "You smoke it with pipes and stuff like that."

TO: "Okay. What kind of pipes"

JA: "Lines."

TO: "What kind of pipes?"

JA: "N'ah...I would – I –"

TO: "Well, what kind of pipes?"

JA: "Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole..."

TO: "Well, you already are. I wanna know what kind pipes you have?"

JA: "I plead the fifth."

TO: "Plead the fifth. What's that?"

JA: "No, you guys are wrong. You guys are wrong. You guys have– I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right." [Door opens/closes]

TO: "We're not making' anything up."

JA: "Sir, sure you are."

TO: "What are we makin' up?"

JA: "You're tellin' me that I didn't have tears in my eyes."

TO: "Yeah."

JA: "You're tellin' me, okay, that, uh, uh, Abe said I kilt [sic] him. That's a lie."

TO: “Yes. Why do you say that’s a lie?”

JA: “Because there’s no way.”

TO: “There’s no way what?”

JA: “That he could even say somethin’ like that.”

TO: “Why?”

JA: “[Voice raised] Because we didn’t do it.”

TO: “Why do you say, ‘we’?”

JA: “Him or I or– Because we, there’s two of us together, is we. There’s no other way –”

RC: [Door opens] “May I ask you a question?”

JA: “Yes, sir?”

RC: “Um, would you like to see the tape of Abe talking to us today?”

JA: “Yes, sir.”

RC: “We can do that. Thank you, we’re gonna do that for you.”

JA: “Can we do it right now?”

RC: “Yeah, can ya hang tight just for a second?”

JA: “Okay. Can I use the bathroom?”

RC: [Inaudible 324]

TO: “Okay, we’re taking a break right now, it’s, uh, nine fifty-two p.m.”

By the defendant stating that he wants to be taken into custody and that he pleads “the fifth”, he appears to have made an invocation of his right to remain silent. (In re Johnny V., [1978] 85 Cal.App.3d 120, 124-126.) Detective O’Connor then responds with the words “Plead the fifth. What’s that.” If there was an invocation, the court must ascertain if that question was in the nature of impermissible further interrogation or a question of permissible clarification. In the decision of In re: Brian W., (1981) 125 Cal.App.3d 590, 600, the court stated, in pertinent part, as follows:

> “It is just as important for police to make certain a suspect means what he says in his answer which asserts his rights as it is to ascertain if he understands the questions sufficiently to knowingly and intelligently waive those rights.”

It is ultimately, according the court In re: Brian W., for the trial court to explore the true intentions of the suspect in connection with an invocation. Each case must be based upon its specific circumstances and the totality of them. The need for a case-specific analysis is amply supported in appellate decisions dealing with similar statements by suspects. (In re Joe R., [1980] 27 Cal.3d , 496, 512-516; People v. Jennings, [1988] 46 Cal.3d 963, 974-9; People v. Ashmus, [1991] 54 Cal.3d 932, 968-70.)

Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in the isolation, be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview.

The interrogating officer did not continue to reinitiate the interview by posing the question: "Plead the fifth. What's that?" The question can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived his right to remain silent by what followed.

For the reasons set forth above, the motion to suppress the confession and other statements of the defendant during the course of the interrogation is **denied**.

DATED: June 17, 1998

/s/ Steven E. Jahr
STEVEN E. JAHR, JUDGE